

PRINCIPLES

OF

MAHOMEDAN LAW.

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PREFACE TO THE EIGHTH EDITION.

THERE have been, since the publication of the last edition, some very important decisions of the Indian High Courts. This has rendered it necessary to re-write several portions of the book and to make numerous additions both in the sections and the notes. At the same time, with a view to keep the book within its present size, I have omitted some portions comprising matter which has now become obsolete.

The present edition contains cases reported in all the Authorized Reports and in Indian Appeals up to the end of 1925.

The proofs have been revised by Mr. B. K. Desai, M.A., LL.B., Advocate, High Court, Bombay, and Mr. Oscar H. Brown, B.A., LL.B., of Gray's Inn, Barrister-at-Law.

D. F. M.

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MAHOMEDAN LAW.



CHAPTER I.

INTRODUCTION OF MAHOMEDAN LAW INTO BRITISH INDIA.

1. Administration of Mahomedan law.—The Mahomedan law is applied by the Courts of British India to Mahomedans not in all, but in some matters only. The power of Courts to apply Mahomedan law to Mahomedans is derived from and regulated by Statutes of the Imperial Parliament and by local legislation (*a*).

For Statutes, see s. 6, for the Acts, see secs. 7 to 13.

The present work does not comprise the whole of pure Mahomedan law, but only such portions thereof as are applied by the Courts of British India to Mahomedans.

2. Extent of application.—As regards British India, the rules of pure Mahomedan law may be divided into three parts—

(i) those which have been *expressly* directed by the Legislature to be applied to Mahomedans, such as the rules of Succession and Inheritance;

(ii) those which are applied to Mahomedans as a matter of *justice equity and good conscience*, such as the rules of the Mahomedan law of Pre-emption;

(iii) those which are not applied at all, though the parties be Mahomedans, such as the Mahomedan Criminal Law, and the Mahomedan Law of Evidence.

(*a*) *Sheik Kudratulla* v. *Mahini Mohan* (1869) 4 B. L. R. 134, 169, *Ibrahim* v. *Muni* (1870) 6 M H.C. 26, 31, *Braja Kishor* v. *Kirti Chandra* (1871) 7 B. L R. 19, 25.

The only portions of pure Mahomedan law that are administered by the Courts of British India to Mahomedans are those comprised in cls. (i) and (ii). In other respects, the Mahomedans in British India are governed by the General Law of British India.

3. **Matters expressly enumerated.**—The rules of Mahomedan law that have been *expressly* directed to be applied to Mahomedans are to be applied except in so far as they have been altered or abolished by legislative enactment.

Thus the rules of the Mahomedan Law of Inheritance are *expressly* directed to be applied to Mahomedans. One of those rules is that a Mahomedan renouncing the Mahomedan religion is to be excluded from inheritance. But this rule has now been abolished by the Freedom of Religion Act 21 of 1850. Hence this rule does not apply.

4. **Matters not expressly enumerated.**—Such of the rules of Mahomedan law as have *not* been *expressly* directed to be applied to Mahomedans will be applied, as a matter of justice, equity and good conscience, if there is no statutory provision for matters covered by those rules.

Thus the rules of the Mahomedan Law of Pre-emption are nowhere expressly directed to be applied to Mahomedans. In the provinces where those rules are applied to Mahomedans, they are applied on grounds of justice, equity and good conscience (s. 178). They are not applied to Mahomedans in Oudh and in the Punjab, for there are *Special Acts* relating to pre-emption for Oudh and the Punjab, and those Acts apply to Mahomedans also (s. 179).

Again, the rules of the Mahomedan Criminal Law are nowhere expressly directed to be applied to Mahomedans. But there are *legislative enactments* relating to criminal law in India such as the Indian Penal Code and the Code of Criminal Procedure. Hence those rules could not be applied on grounds of justice, equity and good conscience. The result is that Mahomedans in British India are governed by the criminal law of British India.

5. **Justice, equity and good conscience.**—The rules referred to in s. 2, cl. (ii), may not be applied if they are in the opinion of the Court opposed to justice, equity and good conscience. But the rules referred to in cl. (i) of that section, that is, rules that have been *expressly* directed by the Legislature to be applied to Mahomedans, must be applied though they may not in the opinion of the Courts conform with justice, equity and good conscience.

Thus the rules of the Mahomedan Law of Pre-emption come under s. 2, cl. (ii), and they are not applied by the Courts of the Madras Presidency on the ground that they are *opposed to* justice equity and good conscience, inasmuch as the Law of Pre-emption

places restriction upon liberty of transfer of property by requiring the owner to sell it in the first instance to his neighbour. The High Courts of Bombay and Allahabad, on the other hand, have applied the Mahomedan Law of Pre-emption to Mahomedans with this remarkable result that the notion of "justice, equity and good conscience" held by those Courts differs from that held by the Madras High Court (*b*). See s. 178 below.

As regards rules which the Courts have been *expressly* directed to apply to Mahomedans, they must of course be applied regardless of considerations of justice, equity and good conscience. Thus the rules of the Mahomedan Law of Marriage have been expressly directed to be applied to Mahomedans in Bengal, United Provinces and Assam (s. 7) One of those rules is that a divorce pronounced by a husband is valid, though pronounced under compulsion (s. 234). Hence the Courts of British India will not be justified in refusing to recognise such a divorce, though it may be opposed to their notions of justice, equity and good conscience (*c*).

6. Mahomedan law in Presidency Towns. -(*1*) As to the Presidency towns of Calcutta, Madras and Bombay, it is enacted by the Government of India Act, 1915, s. 112 [5 and 6 Geo. 5, Ch. 61] as follows:

"The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law of custom to which the defendant is subject." That is to say, the law to be applied in the matters aforesaid shall be the Mahomedan law if both parties are Mahomedans. Similarly, when a dealing takes place between two parties of whom one is a Hindu and the other a Mahomedan, and a suit is brought in respect of that dealing by the Hindu against the Mahomedan, the dispute between them is to be decided according to the Mahomedan law (*d*). But the Mahomedan law to be applied in either case must be such portion thereof as has not been abrogated by the general law of British India [see notes below].

(*2*) The law to be applied by the Presidency Small Cause Courts is the same as that administered for the time being by the High Courts in the exercise of their ordinary

(*b*) *Ibrahim* v. *Muni* (1870) 6 M H C. 26.
(*c*) *Ibrahim* v. *Enayetur* (1869) 4 B.L.R A C. 13.
(*d*) *Azim Un-Nissa* v. *Dale* (1871) 6 Mad. H. C. 455, 475, West and Buhler's Digest of Hindu Law, p 6.

original civil jurisdiction (Presidency Small Cause Courts Act 15 of 1882, s. 16).

Earlier statutes.—Provisions similar to those in sub-s. (1) were contained in the East India Company Act, 1870, s. 17, [21 Geo. 3, ch. 70], which applied to the Supreme Court at Calcutta, and the East India Act, 1797, s. 13, [37 Geo. 3, ch. 142], which applied to the Recorder's Courts at Madras and Bombay. These Acts as well as the High Courts Acts of 1861, 1865 and 1911 have been repealed and re-enacted by the Government of India Act, 1915. But the repeal does not affect the validity of any charter or letters patent under those Acts [Government of India Act, 1915, 130].

Law to be administered in cases of inheritance, succession, contract and dealing between party and party.—This may be repealed or altered by the Governor-General in Council: see the Government of India Act, 1915, s. 131, and the fifth schedule to the Act. In fact the Mahomedan law of contract has been almost entirely superseded by the Indian Contract Act, 1872, and other enactments, and this was done in the exercise of the power given to the Governor-General in Council by the Indian Councils Act, 1861. The latter Act has been repealed and to a large extent re-enacted by the Government of India Act, 1915 (*e*). As regards interest, it is doubtful whether the Mussulman rule prohibiting usury has been repealed by the Usury Laws Repeal Act 28 of 1855 (*f*). The point arose in a recent Privy Council case, but it was not decided (*g*). See s. 65 of the Government of India Act, 1915, and cls. 19 and 44 of the charter for each of the High Courts for Calcutta, Madras and Bombay.

Law to which the defendant is subject.—It is provided by the latter portion of the section that when the parties are subject to different personal laws, the dispute between them is to be decided according to the law to which the defendant is subject. It is not easy to define what these words really mean. The decisions lay down what the words do not mean: they do not say what the words do mean. But whatever the proper construction of those words may be, they do not mean this that where a Hindu purchases land from a European which is subject to his wife's claim for dower, and a suit is brought by the wife against the Hindu purchaser to enforce her right, the Hindu purchaser is to be in any better possession than a European purchaser would be, simply because the Hindu law recognizes no rule of dower (*h*).

7. In Bengal, United Provinces and Assam.—As to Bengal, United Provinces and Assam, except such portions of those territories as for the time being are not subject to the ordinary civil jurisdiction of the High Courts, it is enacted by Act XII of 1887, s. 37, that the Civil Courts of those Provinces shall decide all questions relating to "succession, inheritance, marriage or any religious usage or institution," by the Mahomedan law in cases where the parties are Maho-

(*e*) See *Madhub Chunder* v. *Rajcoomar* (1874) 14 B. L. R. 76; *Nobin Chander* v. *Romesh Chunder* (1887) 14 Cal. 781.

(*f*) *Ram Lal* v. *Harar Chandra* (1868) 3 B. L. R. (O. C.) 130 [not abrogated]; *Mia Khan* v. *Bibijan* (1870) 5 B. L. R. 500 [abrogated].

(*g*) *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I. A. 294, 300, 38 All. 581, 587-588, 36 I. C. 87.

(*h*) *Sarkies* v. *Prosonomoyee* (1881) 6 Cal. 794, 805-806 [21 Geo. 3, Ch. 70, s. 17]; *Azim Un-Nissa* v. *Dale* (1871) 6 Mad. H. C. 455, 474-475 [37 Geo. 3, Ch. 142, s. 13]; *Lakshmandas* v. *Dasrat* (1880) 6 Bom. 168, 183-184; *Mahomed* v. *Narain* (1916) 40 Bom. 358, 363, 368, 32 I. C. 939.

medans, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not mentioned above nor provided for by any other law for the time being in force the decision is to be according to justice, equity and good conscience.

Custom.—Custom binding inheritance in a particular family has long been recognized in India (*i*). Hence evidence is admissible to prove a family custom of succession at variance with the Mahomedan law, though there may be no express recognition of custom as in the Act cited above (*j*). But the burden of proof in such a case lies upon the party who sets up the custom (*k*): the custom must be an ancient and invariable custom, and it must be proved by clear and unambiguous evidence (*l*). As to what is essential to the proof of such a custom, see the undermentioned case (*m*).

Justice, equity and good conscience.—This expression has been interpreted by the Privy Council to mean the rules of English law so far as they are applicable to Indian society and circumstances (*n*).

8. In the Mufassal of Madras.—As to the Mufassal of Madras, it is enacted by the Madras Civil Courts Act III of 1873, s. 16, that all questions regarding "succession, inheritance, marriage, . . . or any religious usage or institution" shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law or by *custom* having the force of law, and in cases where no specific rule exists, the Courts shall act according to justice, equity and good conscience.

Custom.—See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above.

9. In the Mufassal of Bombay.—As to the Mufassal of Bombay, it is enacted by Regulation IV of 1827, s. 26, that "the law to be observed in the trial of suits shall be Acts of Parliaments and regulations of Government applicable to the case: in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

Note that not a single topic of Mahomedan law is *expressly* enumerated in this section. So much, therefore, of Mahomedan law as is administered to Mahomedans by Courts in the Mufassal of Bombay, is administered as a matter of justice, equity and good conscience. As to this last expression, see notes to s. 7 above.

(*i*) *Abdul Hussein* v. *Sona Dero* (1918) 45 Cal. 450, 460, 45 I. A. 10, 14, 43 I. C. 306.

(*j*) *Muhammad Ismail* v. *Lala Sheomukh* (1913) 15 Bom. L. R. 76, 17 C. W. N. 97, 18 I. C. 571 [P. C.]; *Ali Asghar* v. *Collector of Bulandshahr* (1917) 39 All. 574, 40 I. C. 753.

(*k*) 45 Cal. 450, 45 I. A. 10, 43 I. C. 306, *supra*, approving *Daya Ram* v. *Sohel Singh* (1906) Punj. Rec., No. 110.

(*l*) *Muhammad* v. *Sheikh Ibrahim* (1922) 49 I. A. 119, 45 Mad. 308, 67 I. C. 115, ('22) A. P. C. 59 [exclusion of females among Lubbai Mahomedans of Coimbatore].

(*m*) 45 Cal. 450, 460, 45 I. A. 10, 14, 43 I. C. 306, *supra*.

(*n*) *Waghela* v. *Shekh Masludin* (1887) 11 Bom. 551, 561, 14 I. A. 89, 96.

Usage.—Evidence may be given under this section of a custom excluding women from any share in the inheritance of a paternal relation (*o*). In a recent case, the High Court of Bombay gave effect to a usage prevailing in the Presidency of performing rites and ceremonies at the graves of deceased Mahomedans, and granted an injunction at the suit of the Mahomedan residents of Dharwar restraining the purchaser of a graveyard from obstructing them in performing religious ceremonies at the graveyard (*p*). See notes to s. 7 above.

10. In the Punjab and the N.-W. Frontier.—As to the Punjab and the North-Western Frontier Province, it is enacted by the Punjab Laws Act IV of 1872, s. 5, and the North-Western Frontier Regulations VII of 1901, as follows :—

"In questions regarding succession, . . . betrothal. marriage, divorce, dower, . . . guardianship. minority, bastardy, family relations, wills, legacies, gifts, partitions. or any religious usage or institution, the rule of decision shall be—

(1) any custom applicable to the parties concerned. which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority ;

(2) the Mahomedan law, in cases where the parties are Mahomedans, ... except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of the Act, or has been modified by any such custom as is above referred to."

"In cases not otherwise specially provided for. the Judges shall decide according to justice, equity and good conscience."

Ajmer-Merwara.—The provisions of the Ajmer-Merwara Laws, Regulation III of 1877, ss. 4 and 5, are to the same effect.

Custom.—"As regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws." Accordingly the Chief Court of the Punjab refused to recognize a custom of the Kanchans which aimed at the continuance of prostitution as a family business, and the decision was upheld by the Privy Council on appeal (*q*). See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above.

10A. In Ajmer-Merwara.—The provisions of the Ajmer-Merwara Laws, Regulation III of 1877, ss. 4 and 5, are almost to the same effect as the Punjab Laws Act 4 of 1872 [s. 10 above].

(*o*) *Abdul Hussein* v. *Sona Dero* (1918) 45 Cal. 450, 45 I. A. 10, 43 I. C. 306

(*p*) *Ramrao* v. *Rustumkhan* (1901) 26 Bom. 198.

(*q*) *Ghasiti* v. *Umrao Jan* (1893) 21 Cal. 149, 20 I. A. 193.

11. In Oudh.—The provisions of the Oudh Laws Act XVIII of 1876, s. 3, as regards the law to be administered in the case of Mahomedans are the same as in the Punjab.

12. In the Central Provinces.—As to the Central Provinces, it is enacted by the Central Provinces Laws Act XX of 1875, s. 5, as follows :—

"In questions regarding inheritance, . . . betrothal, marriage, dower, . . . guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be the Mahomedan law in cases where the parties are Mahomedans . . . except in so far as such law has been by legislative enactment altered or abolished, or is opposed to the provisions of this Act :

"Provided that, when among any class or body of persons or among the members of any family any custom prevails which is inconsistent with the law applicable between such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to.

"In cases not provided for by [the above clause], or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience."

Custom.—See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above.

13. In Burma.—As to Burma, it is enacted by the Burma Laws Act XIII of 1898, s. 13, that all questions regarding succession, inheritance, marriage, or any religious usage or institution, shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law. In cases not specifically mentioned above nor provided for by any other enactment for the time being in force, the decision is to be according to justice, equity and good conscience.

Custom.—See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above.

CHAPTER II.

CONVERSION TO MAHOMEDANISM.

14. Meaning of "Mahomedan."—The expression "Mahomedan" in the Acts and Statutes referred to in ss. 6-13 includes not only a Mahomedan by *birth*, but also a Mahomedan by *religion*. Hence the Mahomedan law applies not only to persons who are born Mahomedans, but also to persons who have become converts to Mahomedanism, provided the conversion is *bona fide*, and not merely a colourable one (*r*).

[A Christian, *A*, married to a Christian wife, *B*, lives and cohabits with a Native Christian woman, *C*. With a view to legalize the union between them, *A* and *C* both become Mahomedans, and marry in Mahomedan form *during the lifetime of B*. The marriage is not valid. The conversion cannot be said to be *bonâ fide*, as it was actuated solely by the desire to enjoy the privilege, of polygamy conferred by the Mahomedan law: *Skinner* v. *Orde* (1871) 14 M. I. A. 309. See also *In the matter of Ram Kumari* (1891) 18 Cal. 264, and *Nandi* v. *The Crown* (1920) 1 Lah. 440, 59 I. C. 33.]

15. Effect of change of religion.—It is an open question whether conversion to Mahomedanism, made honestly after marriage with the assent of both spouses, and without any intent to commit a fraud upon the law, has the effect of altering rights incidental to the marriage.

[*A* and *B*, both Mahomedans, espouse Christianity, and marry in Christian form. After some time they both revert to Mahomedanism, and go through a form of marriage a second time according to Mahomedan law. After *A*'s death, *B* sues *A*'s relations to recover one-eighth of *A*'s estate as his widow according to Mahomedan law. The defence is that *B* was *divorced* by *A according to Mahomedan form* some time before his death. Supposing the divorce is proved, is the divorce *valid* so as to exclude *B* from inheritance, regard being had to the fact that the marriage was primarily in Christian form, and the divorce was given in Mahomedan form? This question was left open by their Lordships of the Privy Council, as their Lordships held that the divorce was not proved: *Skinner* v. *Skinner* (1897) 25 Cal. 537, 546, 25 I. A. 34.]

16. Khojas and Cutchi Memons.—In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay Presidency are governed in matters of succession and inheritance, not by the Mahomedan, but by the Hindu Law (*s*).

(*r*) *Abraham* v. *Abraham* (1863) 9 M. I. A. 199, 243, *Jawala* v. *Dharum* (1866) 10 M. I. A. 511, 537-38; *Raj Bahadur* v. *Bishen* (1882) 4 All. 343.

(*s*) *Khojas and Memons' Case* (1847) Perry's O. C. 110; *Hirbai* v. *Gorbai* (1875) 12 Bom. H.C. 294 [Khojas]; *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158 [Cutchi Memons], *Mahomed Sidick* v. *Haji Ahmed* (1885) 10 Bom. 1 [Cutchi Memons]; *Moosa Haji Joonas* v. *Haji Abdul Rahim* (1905) 30 Bom. 107; *Saboo Sidick* v. *Ali Mahomed* (1904) 30 Bom. 270; *Jan Mahomed* v. *Datu* (1914) 38 Bom. 449, 22 I.C. 195; *Mangaldas* v. *Abdul* (1914) 16 Bom. L. R. 224, 23 I.C. 565.

Khojas and Cutchi Memons were originally Hindus. They became converts to Mahomedanism about 400 years ago, but retained their Hindu law of inheritance and succession as a customary law. Hence the Hindu law of inheritance and succession is applied to them on the ground of custom. This custom is so well established among them that if any member of either of these communities sets up a usage of succession opposed to the Hindu law of succession, the burden lies upon him to prove such usage (*t*). Where, however, Cutchi Memons migrate from India and settle among Mahomedans, as in Mombasa, the presumption that they have adopted the Mahomedan custom of succession should be readily made. Where, therefore, a Cutchi Memon family migrated from Cutch to Mombasa, and settled there for about fifty years, it was held upon the evidence in the case that the family was governed by the Mahomedan law of succession (*u*).

Cutchi Memons Act.—It is now provided by s. 2 of the Cutchi Memons Act 46 of 1920 and the Cutchi Memons Amendment Act 34 of 1923, that any person who satisfies the prescribed authority—

(*a*) that he is a Cutchi Memon and is the person whom he represents himself to be;
(*b*) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, and
(*c*) that he is resident in British India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the declarant and all his minor children and their descendants shall in matters of succession and inheritance be governed by the Mahomedan law.

16A. Testamentary power of Cutchi Memons.—A Cutchi Memon may dispose of the whole of his property by will.

A custom to that effect was proved in *Advocate-General* v. *Jimbabai* (*v*). There is no doubt that a similar custom exists among the Khojas of Bombay. According to the Mahomedan law, a testator cannot dispose of *more than one-third* of his property by will: see s. 104 below.

16B. Halai Memons.—Halai Memons domiciled in Bombay are governed in all respects by the Mahomedan Law (*w*).

Halai Memons of Porbandar in Kathiawar follow in matters of succession and inheritance Hindu law and not Mahomedan law, differing in that respect from Halai Memons of Bombay. It was so held in the undermentioned case upon evidence of custom among Halai Memons in Porbandar (*x*).

17. Sunni Borahs of Gujarat: Molesalam Girasias of Broach.—The Sunni Borah Mahomedans of Gujarat (*y*) and the Molesalam Girasias of Broach (*z*) are governed by the Hindu law in matters of succession and inheritance.

(*t*) *Abdulrahim* v. *Halimabai* (1915) 43 I. A. 35, 39, 18 Bom. L. R 635, 639, 32 I. C 413, *Hirbai* v. *Gorbai* (1875) 12 B H C 294, 305; *Rahimatbai* v. *Hirbai* (1877) 3 Bom. 34; *In re Haji Ismail* (1880) 6 Bom 452, *Ashabai* v. *Haji Tyab* (1882) 9 Bom. 115; *Mahomed Sidick* v. *Haji Ahmed* (1885) 10 Bom. 1; *In the goods of Mulbai* (1866) 2 B. H. C. 276. The Hindu law as to joint family property does not apply to Cutchi Memons. *Haji Oosman* v. *Haroon* (1923) 47 Bom. 369, ('23) A. B. 148.

(*u*) 43 I. A. 35, 18 Bom. L. R. 635, 32 I. C. 413, *supra*.

(*v*) (1915) 41 Bom 181, 31 I. C. 106; *Advocate-General* v. *Kermali* (1903) 29 Bom. 133, 148, 149.

(*w*) *Khojas and Memons' Case* (1847) Perry's Ort. Cas., 110. 115; *Khatubai* v. *Mahomed Haji Abu* (1923) 53 I. A. 108, 47 Bom. 146, 72 I. C. 202, ('22) A. P. C. 414, affmg. (1918) 43 Bom. 647, 51 I. C. 513.

(*x*) (1923) 53 I. A. 108, 47 Bom. 146, 72 I. C. 202, ('22) A. P. C. 414, *supra*.

(*y*) *Bai Baiji* v. *Bai Santok* (1894) 20 Bom. 53.

(*z*) *Fatesangji* v. *Harisangji* (1894) 20 Bom 181.

These communities also were originally Hindus, and became subsequently converts to Mahomedanism. The Sunni Borahs of Gujarat must not be confounded with the Borahs of Bombay who are Shiahs. See s. 20 below.

17A. Lubbais of Coimbatore.—As among Hindus, so among the Lubbais of the Coimbatore District, the sons exclude the daughters from inheritance (*a*).

The Lubbai Mahomedans of Coimbatore were originally Tamil-speaking Hindus, who subsequently became converts to Mahomedanism. They retain the Hindu rule excluding females from succession.

(*a*) *Shaik* v. *Muhammad* (1916) 39 Mad. 664, 30 I. C. 806.

CHAPTER III.

MAHOMEDAN SECTS AND SUB-SECTS.

18. Sunnis and Shiahs.—The Mahomedans are divided into two sects, namely, the Sunnis and the Shiahs.

The Cutchi Memons of Bombay and Halai Memons belong to the Sunni sect. See ss. 16, 16A and 16B above.

The Khojas and the Borahs of Bombay belong to the Shiah sect. See ss. 16, 16B and 17.

19. Sunni sub-sects.—The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanabalis.

The Sunni Mahomedans of India belong principally to the Hanafi School.

Presumption as to Sunnism.—The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis unless it is shown that the parties belong to the Shiah sect (*b*).

20. Shiah sub-sects.—The Shiahs are divided into three sub-sects, namely, the Asna-Aasharias, the Ismailias and the Zaidyas.

There is yet another class of Mahomedans, called Motazala. They are sometimes spoken of by Mr. Ameer Ali as an independent sect and sometimes as an early offshoot of the Shiah sect; see Ameer Ali's Mahomedan Law, Vol. ii, pp. 21, 158.

21. Each set governed by its law.—The Mahomedan law applicable to each sect is to prevail as to litigants of that sect (*c*).

The Sunni law will therefore apply to Sunnis and the Shiah law to Shiahs, and the law peculiar to each sub-sect will apply to persons belonging to that sub-sect.

22. Change of sect.—A Mahomedan male or female who has attained the age of puberty, may renounce the doctrines of the sect or sub-sect to which he or she belongs, and adopt

(*b*) *Bafatun* v. *Bilaitti Khanum* (1903) 30 Cal. 683, 686.

(*c*) *Deedar Hossein* v. *Zuhoor-oon-Nissa* (1841) 2 M. I. A. 441, 477.

the tenets of the other sect or any other sub-sect, and he or she shall thenceforth be subject to the law of the new sect or sub-sect (*d*).

23. Marriage.—A Sunni woman contracting marriage with a Shiah does not thereby become subject to the Shiah law (*e*).

The same proposition, it seems, would hold good of a Shiah woman marrying a Sunni.

(*d*) *Hayatun un Nissa* v. *Muhammad* (1890) 12 All. 290, 17 I. A. 73 (change of sect); *Muhammad* v. *Gulam* (1864) 1 B. H. C. 236 (change from Shafeiism to Hannafism).

(*e*) *Nasrat* v. *Hamidan* (1882) 4 All. 205.

CHAPTER IV.

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW.

24. Sources of Mahomedan law.—There are four sources of Mahomedan law, namely, (1) the Koran ; (2) Hadis, that is, precepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by authorised persons ; (3) Ijmaa, that is, decisions of the companions of Mahomed and his disciples ; and (4) Kiyas, being analogical deductions derived from a comparison of the first three sources when they did not apply to any particular case (*f*).

The *Kiyas* requires the exercise of reason, and it appears that though Abu Hanifa, the founder of the Hanafi sect of Sunnis, was so much inclined to the exercise of reason that he frequently preferred it in many cases to traditions of single authority, the founders of the other Sunni sects seldom resorted to Kiyas (*g*).

25. Interpretation of the Koran.—The Courts, in administering Mahomedan law, should not, as a rule, attempt to put their own construction on the Koran in opposition to the express ruling of Mahomedan commentators of great antiquity and high authority.

Thus where a passage of the Koran (Sura ii, vv. 241-242) was interpreted in a particular way both in the Hedaya (a work on the Sunni law) and in the Imamia (a work on the Shiah law), it was held by their Lordships of the Privy Council that it was not open to a Judge to construe it in a different manner (*h*).

26. Precepts of the Prophet.—Neither the ancient texts nor the precepts of the Prophet Mahomed should be taken literally so as to deduce from them *new* rules of law, especially when such proposed rules do not conduce to substantial justice.

The words of the section are taken from the judgment of their Lordships of the Privy Council in *Baqar Ali* v. *Anjuman* (*i*).

It is a rule of Mahomedan law that a gift in perpetuity is not valid unless the gift is one to *Charity.* Is a gift by a Mahomedan to his own *children and their descendants* a gift to charity ? No—was the answer given by a majority of the Full Bench of the Calcutta High Court in *Bikani Miya* v. *Shuk Lal* (*i2*). Yes—was the answer given by Ameer Ali, J., in a dissenting judgment, relying on the following precept of the Prophet Mahomed : "A pious offering to one's *family* to provide against their getting into want is more pious than giving alms to the beggars. The most excellent form of *sadakah* (charity) is that which a man bestows upon his own family." Referring to

(*f*) *Morley*, Introd. ccxxvii.
(*g*) *Ib.* p. ccxxxvii.
(*h*) *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 18, 196, 204.
(*i*) (1902) 25 All. 236, 254, 30 I. A. 94.
(*i2*) (1893) 20 Cal. 116.

the judgment of Ameer Ali, J., their Lordships of the Privy Council observed in a later case (j), that it was not safe in determining what was the rule of Mahomedan law on a particular subject to rely upon abstract precepts taken from the mouth of the Prophet without knowing the context in which those precepts were uttered. Their Lordships further observed that the rule of Mahomedan law on the subject was that which was laid down by the majority of the Full Bench, and that the new rule of law sought to be deduced from the precept of the Prophet by Ameer Ali, J., was not one that would conduce to justice. A wakf in favour of children and descendants is now declared to be legal by the Mussalman Wakf Validating Act VI of 1913, provided there is an ultimate gift to charity. See ss. 159-161 below.

27. Ancient texts.—New rules of law are not to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions (k).

28. General rules of interpretation of Hanafi law.—The three great exponents of the Hanafi-Sunni Law are Abu Hanifa, the founder of the Hanafi school, and his two disciples, Abu Yusuf and Imam Muhammad.

It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails (l). Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf (m). When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred (n). But these rules are not inflexible.

When it is doubtful which is the better opinion on a particular question, the Courts of India ought to follow that opinion which is most in accordance with justice, equity and good conscience (n2).

28A. Rules of equity.—The rules of equity and equitable considerations commonly recognised in Courts of Chancery in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases under that system (o).

(j) *Abul Fata* v. *Rasamaya* (1894) 22 Cal 619, 632, 22 I. A. 76, 86, on appeal from (1891) 18 Cal. 399, 631.

(k) *Baqar Ali* v. *Anjuman* (1902) 25 All. 236, 254, 30 I A. 94; *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 448.

(l) *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 448; *Abdul Kadir* v. *Salima* (1886) 8 All. 149, 166-167.

(m) (1886) 8 All. p. 162, *supra*.

(n) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 488, *Khajah Hossein* v. *Shahzadee* 1869) 12 W. R. 344, 346, affmd. in (1869) 12 W. R. 498 See also s. 151 below. In *Muhammad* v. *The Legal Remembrancer* (1893) 15 All. 321, 323, it was held that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf, the Court thinking (though erroneously) that it was so laid down by the Full Bench in *Bikani Miya* v. *Shuk Lal* (1893) 20 Cal. 116.

(n2) *Aziz Bano* v. *Muhammad* (1925) 47 All. 823.

(o) *Hamira Bibi* v. *Zubaida Bibi* (1916) 43, I. A. 294, 301-302, 38 All. 581, 582, 36 I. C. 87. See Hadaya, Book XX, p. 334, "Of the duties of the Kazee."

CHAPTER V.

SUCCESSION AND ADMINISTRATION.

[The two principal Acts in force in British India relating to the succession to and administration of the estate of deceased persons are the Indian Succession Act X of 1865 and the Probate and Administration Act V of 1881, both now amalgamated into one Act being the Succession Act of 1925. The Succession Act of 1865 applied to Europeans, Parsis, East Indians and to all Natives of India other than Hindus, Mahomedans and Budhists. The Probate and Administration Act applied to Hindus, Mahomedans, and Budhists. Since the latter Act applied to Hindus as well as Mahomedans, it contained only *General* rules relating to administration and succession. The same distinction is maintained in the new Act. The new Act is merely a Consolidating Act. The present chapter contains *special rules of Mahomedan law* relating to administration and succession and a few rules from the Probate and Administration Act.]

29. Administration of a Mahomedan's estate.—The property of a deceased Mahomedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges, (2) expenses of obtaining probate or letters of administration, (3) wages due for service rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant, (4) other debts of the deceased according to their respective priorities (if any), and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his death (*p*).

The order set forth above follows the provisions of the Probate and Administration Act, ss. 101-105, now the Succession Act of 1925, ss. 320-323 and s. 325. As regards item No. (5), it is to be noted that a Mahomedan cannot by *will* dispose of more than one-third of what remains of his property after payment of his funeral expenses and debts, unless the heirs consent thereto after his death.

If the deceased was a Sunni at the time of his death, his property would be distributed among his heirs according to Sunni law, and if he was a Shiah, it would be distributed according to Shiah law. In other words, succession to the estate of a deceased Mahomedan is governed by the law of the sect to which he belonged at the time of his death and not by the law of the sect to which the persons claiming the estate as his heirs belong (*p*).

The person primarily entitled to administer the estate of a deceased Mahomedan (*i.e.*, to apply it in the manner set forth in the section) is the *executor* appointed under

(*p*) *Hayat-un-Nissa* v. *Muhammad* (1890) 12 All. 290, 17 I. A. 73.

his will If the deceased left no will, the person entitled to administer his estate is the person to whom letters of administration are granted Such a person is called *administrator* The persons primarily entitled to letters of administration are the *heirs* of the deceased If no letters are obtained, the heirs are entitled to administer the estate

30. Vesting of estate in executor and administrator.—The executor or administrator, as the case may be, of a deceased Mahomedan, is, under the provisions of the Probate and Administration Act, 1881, now the Succession Act of 1925, his legal representative for all purposes, and all the property of the deceased vests in him as such.

But since a Mahomedan cannot dispose of by will more than one-third of what remains of his property after payment of his funeral expenses and debts, and since the remaining two-thirds must go to his heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor, when he has realized the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will, and of these trusts, one is created by the Act and the probate irrespective of the will, the other by the will established by the probate (*q*)

The first paragraph is a reproduction of the provisions of s 4 of the Probate and Administration Act now s 211 of the Succession Act of 1925 An executor under the Mahomedan law is called *wasi* derived from *wasiyat* which means a will But though the Mahomedan law recognised a *wasi* it did not recognize an administrator there being nothing analogous in that law to letters of administration A *wasi* or executor under the Mahomedan law was merely a *manager* of the estate and no part of the estate of the deceased *vested* in him as such As a *manager* all that he was entitled to do was to pay the debts and distribute the estate as directed by the will He had no power to sell or mortgage the property of the deceased not even for the payment of his debts The powers, however, of a Mahomedan executor *under the Probate and Administration Act* now the Succession Act of 1925 are much larger for under that Act the property of a deceased Mahomedan *vests* in his executor The property vests whether or no he takes out probate As a result of the *vesting* of the estate in a Mahomedan executor, he has the power to dispose of as he thinks fit the property for the time being *vested* in him in the due course of administration, a power which he did not possess before the Probate and Administration Act (*r*) [see s 90 of the Act, now s 307 of the Succession Act of 1925]

31. Devolution of inheritance.—Subject to the provisions of the foregoing section, the whole property of the deceased, where he has died intestate, or where he has left a will, so much of it as cannot be, or is not, disposed of by his will, devolves on

(*q*) *Mirza Kurratulain* v *Nawab Nuzhat ud Dowla* (1905) 33 Cal 116 128 32 I A 244 257

(*r*) *Mahomed Yusuf* v *Hargovandas* (1923) 47 Bom 231 70 I C 268 ('22) A B 92 But see the dicta of Pugh J in *Sakina Bibee* v *Mahomed Ishak* (1910) 37 Cal 839, 8 I C 655

his heirs in specific shares at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased.

The above rule follows from the decision of the Allahabad High Court in *Jafri, Begam* v. *Amir Muhammed* (s) read with the preceding section. When a Mahomedan dies leaving a will, and there is an executor appointed under the will, the property of the deceased vests in the executor subject to the provisions of the second paragraph of s. 30. When a Mahomedan dies intestate, and there is a grant made of letters of administration of his property, the property vests in the administrator. But when there is no executor or administrator, the property of the deceased vests at the moment of his death in his *heirs*. The reason why the property of a deceased *Mahomedan* vests in his *heirs* in the absence of an executor or administrator is that the Mahomedan law does not recognise any *representation* to the estate of the deceased (t); if it did, his property could vest only in his legal *representative*, that is, his executor or administrator, and it could not vest in his *heirs*.

The property, when it vests in the heirs, vests in *specific shares*, that is, the heirs take their shares in severalty, their rights being analogous to those of tenants-in-common (u). The share of each heir *before* distribution is said to vest in him *in interest*. *After* distribution, the share vests in the heir *in possession*. When an heir comes into *possession* of his share, it is clear that he may alienate it by sale, mortgage, gift or otherwise. But he has not got the same powers of disposition when the share has not yet been vested in possession. Thus a valid *gift* cannot be made by an heir of his share which has not yet vested in him in possession except to a *co-heir* (s. 134). And as regards disposition by way of *sale* or *mortgage*, the validity of the disposition depends on the conditions set forth in the next section.

Limitation.—Where the heirs of a deceased Mahomedan continue to live as tenants-in-common without dividing the estate, and a suit is subsequently brought by one of them for recovery of his share by partition, limitation does not run from the date of the death of the deceased; in other words, it is art. 144 and not art. 123 of the Limitation Act that governs the period of limitation (v).

Administration suit.—It may here be noted that any one of the heirs may bring an administration suit; he is not bound to bring a suit for partition (w).

32. Alienation of share before distribution.—(*1*) "A creditor of a deceased Mahomedan cannot follow his estate into the hands of a bona fide purchaser for value to whom it has been alienated by his heir-at-law." In other words, any heir may, even before distribution of the estate, transfer his own

(s) (1885) 7 All. 822, followed in *Muhammad Awaiz* v. *Har Sahi* (1885) 7 All. 716

(t) *Amir Dulhin* v. *Baij Nath* (1894) 21 Cal 311, 315. The contrary opinion expressed by Markby, J., in *Assamathem Nessa Bibee* v. *Lutchmeeput Singh* (1878) 4 Cal. 142, 158, is no longer law.

(u) *Abdul Khader* v. *Chidambaram* (1909) 32 Mad. 276, 278, 3 I.C. 876; *Abdul Majeeth* v *Krishnamacharar* (1917) 40 Mad. 243, 254, 40 I.C. 210.

(v) *Kallangowala* v. *Bibishaya* (1920) 44 Bom. 943, 58 I C. 42. *Nurdin* v. *Bu Umrao* (1921) 45 Bom. 519, 59 I.C. 780; mst. *Zainab* v. *Ghulam Rasul* (1923) 4 Lah. 402, 73 I. C. 425, ('23) All. 519.

(w) *Essafally* v. *Abdeali* (1921) 45 Bom. 75, 59, I.C. 396.

share of the inheritance (*x*) either by absolute sale or by mortgage and give the transferee a good title thereto, notwithstanding any debts that might be due from the deceased, provided that the transferee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that he had notice of the debts (*y*) [ills. (a) and (c)].

Even if the transferee has notice of the debts, the transfer is not absolutely void, but voidable merely at the option of the creditor, so as to entitle him to follow the estate in the hands of the transferee. But the creditor is not entitled to follow the estate in the transferee's hands, unless the assets in the hands of the heirs are insufficient to satisfy his claim (*z*) [ill. (d)].

(2) Where the estate or any part thereof consists of immoveable property, and the transfer is made by an heir of his share in such property *during the pendency* of a creditor's suit in which the creditor obtains a decree passed for the payment of his debt *out of the estate* which has come into the hands of the heir, the transferee will be affected by the doctrine of lis pendens (*a*) [ill. (e)].

Explanation.—" Transferee " within the meaning of this section includes a purchaser at a sale in execution of a decree obtained against an heir by his creditor (*b*) [ill. (b)].

Illustrations.

(a) A Mahomedan, who owes a sum of money to *C*, dies leaving certain heirs. The heirs sell the whole of the property of the deceased to *P* before payment of the debt due to *C*. *P* buys the property without notice of the debt due to *C*. *C* then obtains a decree against the heirs for the amount of the debt, and in execution of the decree applies for an attachment of the property sold by the heirs to *P*, alleging that the heirs had no right to alienate the property of the deceased before payment of the debt due from the deceased. *C* is not entitled to attach the property in the hands of *P*, the latter being a *bona-fide* purchaser for value without notice of *C*'s claim : *Land Mortgage Bank* v. *Bidyadhari* (1880) 7 C. L. R. 460.

Note.—So long as the estate of a deceased Mahomedan is in the hands of his heirs, a creditor of the deceased who has obtained a decree against the heirs for his debts may follow it in the hands of the heirs, that is to say, he may attach the estate in the hands of the heirs in execution of the decree. But the case is different when the estate has been sold by the heirs, and it has passed into the purchaser's hands. In such a case if the purchaser bought *without notice* of the debts, the creditor cannot attach the property in the hands of the purchaser. It does not matter that the object of the heirs in selling the

(*x*) *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, 406, 408, 5 I. A. 211, 220, 222 ; *Abdul Majeeth* v. *Krishnamacharuar* (1917) 40 Mad. 243, 254, 40 I.C. 210. In *Mohideen Bee* v. *Syed Meer* (1915) 38 Mad. 1099, 1101, 32 I.C. 1002, it was said that a Mahomedan heir takes a share of *each item* of the property left by the deceased.

(*y*) *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, 5 I. A. 211 ; *Land Mortgage Bank* v. *Bidyadhari* (1880) 7 C. L. R. 460.

(*z*) *Rajkristo* v. *Koylash Chandur* (1881) 8 Cal. 24.

(*a*) *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, L. R. 5 I. A. 211.

(*b*) *Wahidunissa* v. *Shubrattun* (1870) 6 B. L. R. 54.

property was to defraud the creditor, for the question being one between the creditor and the *purchaser*, the test is whether the *purchaser* took with notice of the debts, and not whether the *heirs* intended to defraud the creditor (c).

(b) A Mahomedan, who owes a sum of money to C, dies leaving two sisters as his only heirs. C obtains a decree for the amount of his debt against the sisters as representing the estate of the deceased. Subsequently a creditor of the sisters obtains a decree against them, and the estate of the deceased in the hands of the sisters is sold in execution of that decree, and purchased by P *without notice of C's claim*. C then applies for attachment of the property of the deceased in the hands of P. He is not entitled to attach the property, for P is a purchaser *without notice* of C's claim : *Wahidunissa* v. *Shubrattun* (1870) 6 B. L. R. 54, with facts slightly altered.

Note.—The only distinction between this and the preceding illustration is that in the latter case the sale by the heirs *voluntary*, while in the present illustration the sale is *in execution of a decree* against the heirs. The point to be noted is that in both cases C sought to attach the property after it had passed from the hands of the heirs into the hands of a *bona fide* purchaser for value without notice of C's claim and in both cases it was held that he was not entitled to do so.

(c) A Mahomedan dies leaving a son and a widow C. The deceased owes a large sum of money to C for her dower The son mortgages the whole of the estate of the deceased to P to secure repayment of advances made to him by P without *notice of C's claim*. Subsequently C obtains a decree for the amount of her debt against the son and in execution of the decree attaches the mortgaged property in the hands of the son. During the pendency of the attachment, P sues the son on the mortgage-bond and obtains a decree for the realization of the mortgage-debt from the mortgaged property. The property mortgaged is sold in pursuance of the decree and purchased by X. Is X entitled to have the attachment set aside ? Yes, for X derives his title under a sale in execution of the decree obtained by P who took the mortgage before the institution of C's suit without notice of C's claim : *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402 5 I. A. 211, with facts slightly altered.

Note.—The only distinction between this and ill. (a) is that in the latter case the alienation by the heirs was by way of *sale* while in the present illustration it is by way of *mortgage*. The test is whether P, the *mortgagee*, was a *bona fide* transferee for value without notice of C's claim, and not whether X, the purchaser from the mortgagee, purchased with notice of that claim.

(d) A Mahomedan, who is indebted to C, dies leaving a widow and other heirs. The widow sells to P certain land allotted to her on distribution of the estate of the deceased. P had notice at the time of purchase of C's claim. Subsequently C obtains a decree against the heirs for the amount of his debt, and seeks to attach the land sold by the widow to P. C is not entitled to attach the land in the hands of P, though P had notice of his claim, unless it is shown that the assets in the hands of the heirs are not sufficient to satisfy his claim : *Rajkristo* v. *Koylash Chunder* (1881) 8 Cal. 24, with facts slightly altered.

Note.—The mere fact that P had notice of C's claim does not entitle C to follow the widow's share in the hands of P unless C can show that there are not sufficient assets in the hands of the heirs for the payment of his debt.

(c) *Wahidunissa* v. *Shubrattun* (1870) 6 B. L. R. 54, 68.

(e) A Mahomedan, who owes a sum of money to *C*, dies leaving a son as his only heir. *C* institutes a suit against the son for an account of the estate of the deceased come to his hands and for payment of his debt out of the estate. *During the pendency* of the suit, the son sells to *P* certain land forming part of the property of the deceased. A decree is subsequently passed in *C*'s suit for the payment of his debt *out of the estate* come into the hands of the son. *C* applies in execution of the decree for attachment of the property in the hands of *P*. *C* is entitled to attach the property: *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, 5 I. A. 211, followed in *Yasin Khan* v. *Muhammad* (1897) 19 All. 504.

Note.—In ill. (a) the sale by the heirs was made *before* the institution of the creditor's suit. In the present case the sale is made *during the pendency* of the creditor's suit which in its nature was an administration suit as indicated by the form of the decree. The decree was against the estate, and not a simple money decree (*d*). The rule laid down in cl. 2 of the present section is merely an application of the doctrine of *lis pendens* (see Transfer of Property Act, s. 52).]

33. **Liability of heirs for debts.**—(*1*) The heirs of a deceased Mahomedan are liable, before distribution of the estate, to pay the debts of the deceased to the extent of the assets to which they may have succeeded, but they are not liable to pay debts exceeding such assets (*e*).

(*2*) After the estate is distributed each heir is liable for debts due from the deceased to the extent only of a share of the debts proportionate to his share of the estate (*f*).

Illustrations.

[(a) A Mahomedan dies leaving assets of the value of Rs. 4,000 and debts amounting to Rs. 5,000. The liability of the heirs is confined to the amount of the assets, namely, Rs. 4,000, and the creditor is not entitled to a personal decree against the heirs for the balance of the debt.

(b) A Mahomedan, who is indebted to *C* in the sum of Rs. 3,200, dies leaving a widow, a son, and two daughters. The heirs divide the estate without paying the debt, the widow taking 1/8, the son taking 7/16, and each daughter 7/32. *C* then sues the widow and the son for the *whole* of the debt due to him from the deceased. The widow is liable to pay only (1/8×3,200)=Rs. 400, and the son (7/16×3,200)=Rs. 1,400; they are not liable for the whole debt: *Pirthipal Singh* v. *Husaini Jan* (1882) 4 All. 361.]

34. **Distribution of estate.**—If the estate is not insolvent, the heirs may divide it at any time after the death of the deceased, and the distribution is not liable to be suspended until payment of the debts.

(*d*) *Bhola Nath* v. *Maqbul-un-Nissa* (1903) 26 All. 28. It is stated in the judgment in this case that the decree in *Yasin Khan's* case cited in ill. (e) was a simple money decree and not a decree for payment of the creditor's debt *out of the estate*. If so, the decision in that case is obviously wrong.

(*e*) *Meer Aleem Ullah* v. *Alif Khan*, I.S.D.A., Beng. 57.

(*f*) *Hamir Singh* v. *Zakia* (1875) 1 All. 57; *Pirthipal Singh* v. *Husaini Jan* (1882) 4 All. 361; *Ambashankar* v. *Sayad Ali* (1894) 19 Bom. 273; *Bussenteram* v. *Kamaluddin* (1885) 11 Cal. 421, 428.

So held by the High Court of Allahabad (*g*) relying on certain passages from the Hedaya, and, following it, by the High Court of Calcutta (*h*). In a later Allahabad case (*i*), Mahmood, J., said that the translation of the said passage was only a loose paraphrase of the original Arabic, and he expressed the opinion that the estate may be distributed *though it may be insolvent.*

According to Mahomedan law the estate of a deceased person vests in his heirs at the moment of his death (s. 31). The heirs therefore may divide it at any time, even before payment of the debts due by the deceased. As a result of the rule set forth in the present section, it is not competent to a creditor of the deceased to go against *any one heir* for the *whole* of his debt, saying that the heir ought not to have divided the estate before payment of debts. The creditor can recover from the heir sued only the heir's proportionate share of the debt [s. 33, ill. (b)].

35. Suit by creditor against executor or administrator.—If the estate is represented by an executor or administrator, a suit by a creditor of the deceased should be instituted against the executor or administrator as the case may be.

36. Suit by creditor against heirs.—If there be no executor or administrator, the creditor may proceed against the *heirs* of the deceased, subject to the following conditions:—

(*1*) If the estate is *distributed*, and the suit is brought against some only of the heirs of the deceased, the creditor is not entitled to a decree for the whole amount of his debt, but only for an amount proportionate to the aggregate share of the defendants in the property [see s. 33 (*2*)].

(*2*) If the estate is *not distributed*, the creditor may, according to the decisions of the High Court of Calcutta, sue any heir in possession of the *whole or any part* of the estate without joining the other heirs as defendants, and the Court may in such a suit pass a decree for the sale, not only of that particular heir's share in the estate, but of all the assets of the deceased that are in his possession. Where such a decree is passed and a sale is effected in execution of the decree, the sale will pass to the purchaser not only the interest of that particular heir in the property sold, but the interests of the other heirs also (including minors), though they were not parties to the suit (*j*), unless the decree was obtained by consent (*k*), or unless it is proved that the debt was not due (*l*) [ills. (a) and (b)].

(*g*) *Hamir Singh* v. *Zakia* (1875) 1 All. 57, 59 [F. B.]; *Prithipal Singh* v. *Husaini Jan* (1882) 4 All. 361, 366.

(*h*) *Bussenteram* v. *Kamaluddin* (1885) 11 Cal. 421, 428.

(*i*) *Jafri Begum* v. *Amir Muhammad Khan* (1885) 7 All. 822, 838.

(*j*) *Muttyjan* v. *Ahmed Ally* (1882) 8 Cal. 370; *Dulhin* v. *Baij Nath* [1894] 21 Cal. 311.

(*k*) *Assamathem* v. *Roy Lutchmeeput Singh* (1878) 4 Cal. 142, 155.

(*l*) *Khursetbibi* v. *Keso Vinnayek* (1887) 12 Bom. 101, 103.

The same view was taken, though based on different grounds, by the High Court of Bombay in earlier decisions (*m*) with this exception that a sale in execution did not bind the other heirs unless the heir against whom the decree was obtained was in possession of the *whole* estate of the deceased [ills. (c) and (d)]. But this view has been disapproved in recent cases, and it has been held that a sale in execution of a decree passed against an heir in possession in a creditor's suit does not pass to the purchaser the interest of those heirs in the estate who were not parties to the suit even if the heir against whom the decree was passed was in possession of the *whole* estate (*n*) [ill. (dd)]. This view coincides with that taken by the High Court of Allahabad.

In *Pathummabi* v. *Vittil* (*o*), the High Court of Madras followed the earlier rulings of the Bombay High Court, but the authority of that decision has been considerably shaken by the observations of Abdur Rahim, J., in *Abdul Majeeth* v. *Krishnamachariar* (*p*).

According to the rulings of the Allahabad High Court, a decree relative to his debts passed in a contentious or non-contentious suit against only such heirs of a deceased Mahomedan debtor as are in possession of the whole or part of his estate, binds each defendant to the extent of his full share in the estate (*q*), but it does not bind the other heirs who by reason of absence or any other cause are out of possession, so as to convey to the auction-purchaser in execution of such a decree the rights and interests of such heirs as were not parties to the decree, and they will be entitled to recover from the auction-purchaser possession of their share in the property sold subject, however, to payment to the purchaser of their proportionate share of the debts for which the decree was made (*r*), unless the circumstances are such as do not call for the exercise of this equity in favour of the purchaser (*s*) [ills. (e) and (f)].

(*m*) *Khursetbibi* v. *Keso Vinnayek* (1887) 12 Bom. 101; *Davalava* v. *Bimaji* (1895) 20 Bom. 338, followed in *Virchand* v. *Kondu* (1915) 39 Bom. 729, 31 I. C. 180 [mortgage-decree].

(*n*) *Bhagirthibai* v. *Roshanbi* (1919) 43 Bom. 412, 51 I. C. 18, dissenting from 12 Bom. 101 and 20 Bom. 338, *supra*; *Shahasaheb* v. *Sadashiv* (1919) 43 Bom. 575, 581, 51 I. C. 223 [mortgage suit], dissenting from 39 Bom. 729, 31 I. C. 180, *supra*; *Lala Miya* v. *Manubibi* (1923) 47 Bom. 712, 73 I. C. 246, ('23) A. B. 411.

(*o*) (1902) 26 Mad. 734, 738.

(*p*) (1917) 40 Mad. 243, 255, 257, 40 I. C. 210.

(*q*) *Dallu Mal* v. *Hari Das* (1901) 23 All. 263, 265.

(*r*) *Jafri Begum* v. *Amir Muhamad Khan* (1885) 7 All. 822; *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716; *Hamir Singh* v. *Zakia* (1875) 1 All. 57. See also *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 239.

(*s*) *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822. See the third question referred to the Full Bench in the above case and the form of it as amended by the Full Bench (*ib*. p. 825).

[(a) A Mahomedan dies leaving a widow, a daughter, and two sisters. After his death a suit is brought by a creditor of the deceased aginst the widow and the daughter who alone are in possession of the *whole* estate, and a decree is passed "against the assets of" the deceased. The decree and the sale in execution of the property left by the deceased are binding on the sisters though they were not parties to the suit: *Muttyjan* v. *Ahmed Ally* (1882) 8 Cal. 370.

(b) A Mahomedan dies leaving a widow and other heirs. A suit is brought by a creditor of the deceased against the widow alone who is in possession of a *part* of the estate. The other heirs are not necessary parties, and the creditor is entitled to a decree not only against the share of the widow in the estate, but the full amount of assets which have come into her hands and which have not been applied in the discharge of the liabilities to which the estate may be subject at her husband's death: *Amir Dulhin* v. *Baij Nath* (1894) 21 Cal. 311.

(c) A Mahomedan woman, Khatiza, dies leaving a minor son and a daughter. After her death a suit is brought by a creditor of the deceased against "Khatiza, deceased, represented by her minor son represented by his guardian" (*t*), and a decree is passed in that form. The deceased was entitled to a share in a *Khoti Vatan* and "the right, title, and interest of Khatiza" in that share is sold in execution of the decree. The purchaser acquires a title unimpeachable by the daughter, though she was not a party to the suit or to the subsequent proceedings in execution: *Khairshetbibi* v. *Keso Vinayek* (1887) 12 Bom. 101 (*u*) [No reference was made in the judgment to the Calcutta cases cited above nor to the Allahabad cases cited in ill. (e)].

(d) A Mahomedan dies leaving a widow, a minor son, and two daughters. After his death a suit is brought by a mortgagee from the deceased against the son as represented by his guardian and mother, claiming possession of the land mortgaged to him as owner under a *gahan lahan* clause in the mortgage. The widow is in possession of the estate and an *ex-parte* decree is passed directing her to make over possession of the land to the mortgagee, and he is accordingly put in possession. The decree binds the daughters though they were not parties to the suit, and they are not entitled to redeem the mortgage as against the mortgagee or a purchaser from him: *Davalava* v. *Bhimaji* (1895) 20 Bom. 338

(dd) A Mahomedan dies leaving a widow and a daughter. After his death C, a creditor of the deceased, sues the widow for the recovery of a debt due to him and a decree is passed in his favour for Rs 327 to be recovered out of the estate of the deceased. In execution of the decree, the right, title and interest of the deceased in a house is sold and it is purchased by *P*. The daughter, who was not a party to the suit, subsequently sues *P* to recover by partition her share in the house. *Held*, disapproving the cases cited in ills. (c) and (d), that the daughter, *not being a party to C's suit*, was not bound by the decree passed in the suit, and that the sale did not pass her interest in the house to *P*, and that she was entitled to recover her share in the house: *Bhagirthibai* v. *Roshanbi* (1919) 43 Bom. 412, 51 I.C. 18. [In this case the widow against whom the decree was obtained was in possession of the whole house; see p. 427 of the report, lines 27-28.]

(*t*) This form of suit, which was at one time common in the Mofussil of Bombay, has been recently disapproved of by the Bombay High Court.

(*u*) Note that in this case "no part of the produce of the *Khoti* was in actual possession of either of the heirs of the deceased."

(e) A creditor of a deceased Mahomedan obtains a decree upon a hypothecation bond "for recovery of his debt by enforcement of lien" against an heir of the deceased in possession of the estate. The whole estate is sold in execution of the decree, and it is purchased by the decree-holder. Subsequently another heir of the deceased, who was not a party to these proceedings, sues the decree-holder as purchaser for recovery of his share in the estate. According to the Allahabad High Court, he is entitled to possession of his share on payment of his proportionate share of the debts which were paid off from the proceeds of the sale: *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716, following *Jafri Begum* v. *Amir Muhammad* (1885) 7 All. 822.

(f) A creditor of a deceased Mahomedan obtains a money decree against an heir of the deceased in possession of the estate, and attaches certain immoveable property forming part of the estate in execution of the decree. The value of the immoveable property exceeds the share of the defendant. According to the Allahabad High Court, the defendant is entitled to object to the attachment and sale of the right and interest of the other heirs who were not parties to the suit, upon the ground that as regards them he is in possession of the property as trustee: *Dallu Mal* v. *Hari Das* (1901) 23 All. 263. This follows from the decision set out in ill. (e).]

Principle of the Calcutta rulings.—According to the Calcutta decisions, a creditor's suit against an heir in possession is in the nature of an administration suit binding on all the heirs of a deceased Mahomedan. This theory appears to have been dictated principally by the consideration that grave injustice might result if the creditor were to be confined to the recovery of a fractional portion only of his claim as held by the Allahabad High Court. The same Court has further endeavoured to strengthen its decision by the analogy, though incomplete, of the case of an executor *de son tort* (v), who can be sued according to the English law for an account of the specific assets that have come into his hands, though there may be no legal representative. Commenting on the view of the Calcutta Court, Heaton, J., said in *Bhagirthibai* v. *Roshanbi* (w): "It seems to me to be a mistake in terms to call a suit by a creditor to establish a *single* debt against the estate of a deceased person a creditor's *administration* suit."

Principle of the Bombay rulings.—In the cases cited in ills. (c) and (d), the Bombay High Court followed the rule of Hindu law, namely, that "when, in a (creditor's) suit; the debt is due from the father and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the [deceased], and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they were not bound by the sale simply because they were not parties to the record" (x). In 43 Bom. 412, 51 I.C. 18, cited in ill. (dd), the Court said that there was no warrant for the application to Mahomedans of the above-mentioned rule of Hindu law.

Principle of the Allahabad rulings.—The reasoning of the Allahabad High Court may thus be stated in the words of Mahmood, J.: "To hold that a decree obtained by a creditor of the deceased against *some* of his heirs will bind also those heirs who were not parties to the suit, amounts to giving a judgment *inter partes* or rather a judgment *in personam* the binding effect of a judgment *in rem*, which the law limits to cases provided for by s. 41 of the Evidence Act. But our law warrants no such course, and the reason seems to me to be obvious. Mahomedan heirs are independent owners of

(v) *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311, 317.

(w) (1919) 43 Bom. 412, 422, 51 I. C. 18.

(x) *Davalava* v. *Bhimaji* (1895) 20 Bom. 338, 344, 345.

their specific shares, and if they take their shares subject to the charge of the debts of the deceased, their liability is in proportion to the extent of their shares. And once this is conceded, the maxim *res inter alias acta alteri nocere non debet* would apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family" (*y*). The meaning of the maxim as applied to the question now under consideration is that a judgment in a suit between *A* and *B* is not binding upon *C* unless *C* is the privy either of *A* or *B*.

37. Alienation by heir for payment of debts.—One of several heirs of a deceased Mahomedan, though he may be in possession of the whole estate of the deceased, has no authority in law to deal with the shares of his co-heirs, not even for the purpose of discharging the debts of the deceased. It follows that if he sells any property in his possession forming part of the estate of the deceased for discharging the debts of the deceased, such sale, though it may operate as a transfer of his interest in the property, is not binding on the other co-heirs or other creditors of the deceased (*z*).

It has been so held by a Full Bench of the Madras High Court overruling *Pathummabi* v. *Vittil* (*a*), an earlier decision of the same High Court, and dissenting from the Allahabad decision in *Hasan Ally* v. *Mehdi Hussain* (*b*). The reference to the Full Bench was necessary because in *Pathummabi's* case the Court had expressed an opinion quite contrary to that laid down in the present section. That opinion was based on the ground that if a sale *in execution of a decree* obtained by a creditor against an heir in possession of the estate bound the other heirs though they were not joined as parties to the suit [s. 36 (2)], it made no difference that the heir met the demand by a *voluntary* sale. But the view was open to the criticism that it ignored the distinction between a debt which had been adjudged by the Court and a debt not so adjudged (*c*), and it has now been dissented from by the Full Bench.

As to ostensible ownership, see *Mubarak-un-Nissa* v. *Muhammad* (*d*), a case under s. 41 of the Transfer of Property Act, 1882.

38. Recovery through Court of debts due to the deceased.—No Court shall pass a decree against a debtor of a deceased Mahomedan for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, except on the production, by the person so claiming, of a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under ss. 31 and 32 of the Administrator-General's Act, 1913, and having the debt mentioned therein, or a succession certificate granted under Part X of the Indian Succession Act 39 of 1925, and

(*y*) *Jafri Begum* v. *Amir Muhammad* (1885) 7 All. 822, 842, 843.

(*z*) *Abdul Majeeth* v. *Krishnama Chariar* (1917) 40 Mad. 243, 40 I. C. 210, [F.B.]; *Sukur* v. *Asmot* (1923) 50 Cal. 978, 79 I. C. 491, ('24) A. C. 384. See *Gulam Goss* v. *Shriram* (1919) 43 Bom. 487, 51 I. C. 79 [sale of equity of redemption by one co-heir—suit for redemption by other co-heirs—limitation].

(*a*) (1902) 26 Mad. 734.

(*b*) (1877) 1 All. 533.

(*c*) *Baba* v. *Shivappa* (1895) 20 Bom. 199, 201.

(*d*) (1924) 46 All. 377, 79 I. C. 174, ('24) A. A. 384.

having the debt specified therein, or a certificate granted under the Succession Certificate Act, 1889, or a certificate granted under Bombay Regulation VIII of 1827, and having the debt specified therein, and if granted after the first day of May, 1889, having the debt specified therein.

Explanation.—The word "debt" in this section includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

This section reproduces the provisions of s. 4 of the Succession Certificate Act VII of 1889, now s. 214 of the Succession Act of 1925, so far as they apply to Mahomedans. As to succession certificates it is provided by s. 1, cl. 4, of the Succession Certificate Act, now s. 1 (1) of the Succession Act of 1925, that no certificate shall be granted with respect to any debt or security to which a right is required to be established by probate or letters of administration [see ss. 212 and 213 of the Succession Act of 1925].

Probate and Letters of administration.—It is not necessary in the case of a Mahomedan will that the executor should obtain probate of the will to establish his right as such in a Court of Justice [Succession Act, 1925, s. 213]. Nor is it necessary where a Mahomedan has died intestate that his heirs should obtain letters of administration to establish their right to any part of the property of the deceased in a Court of Justice [Succession Act, 1925, s. 212] (*e*) But where a suit is brought to recover a *debt* due to the deceased, the Court shall not pass a decree except on production of probate or of letters of administration or a succession certificate.

Recovery of debts through Court.—It must be observed that the rule laid down in the present section applies only where a debt due to the deceased is sought to be recovered *through a Court of Law.* A debtor of the deceased may pay his debt to the executor, though he may not have obtained probate or a succession certificate, and such payment will operate as a discharge to the debtor. Similarly the debtor may pay the debt to the heirs of the deceased, though they may not have obtained either letters of administration or a succession certificate. But payment of a debt by a debtor to one of several heir does not discharge the debt as to all (*f*), unless all the heirs join in the receipt. If all the heirs do not so join, the debtor is not safe unless he pays the debt to a person to whom a grant has been made of probate or letters of administration or a succession certificate.

It may also be noted that where a debt is sought to be recovered by *legal proceedings*, it is not necessary that the plaintiff should have in readiness *when the suit is filed* the probate or letters of administration or the certificate referred to in the present section. But no *decree* will be passed unless the requisite documents are produced, and this is all that the section provides for (*g*).

(*e*) *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom 241, 255; *Sakina Bibee* v *Mahomeda Ishak* (1910) 37 Cal. 839, 8 I. C. 655. It must, however, be noted that when there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by *any one* of them *who has proved the will* [Probate and Administration Act, s. 92, now s. 311 of the Succession Act of 1925].

(*f*) *Pathummabi* v. *Vittil Ummachabi* (1902) 26 Mad. 734, 739. Compare *Sitaram* v. *Shridhar* (1903) 27 Bom. 292. See also *Ahinsa Bibi* v. *Abdul Kader* (1901) 25 Mad. 26, 39.

(*g*) *Chandra Kishore* v. *Prasanna Kumari* (1910) 38 Cal. 327, 38 I. A. 7, 9 I.C. 122.

Debt.—A suit by one member of a family to obtain his share of the family property from the other members is not a suit to recover a "debt" (*h*). It is not settled whether a decree in a mortgage suit directing the *sale* of the mortgaged property is a decree for payment of "debt" within the meaning of this section (*i*).

39. Enactments relating to administration.—In matters not hereinbefore specifically enumerated, the administration of the estate of a deceased Mahomedan is governed by the provisions of the following Acts to the extent to which they are severally applicable to the case of Mahomedans, namely :—

(1) Indian Succession Act 39 of 1925 ;

(2) Administrator-Generals Act 3 of 1913 ;

(3) Administrator-General and Official Trustees Act 5 of 1902, s. 4 ; and

(4) Bombay Regulation Act 8 of 1827.

Such of the provisions of the Administrator-General's Act as apply to Mahomedans come into operation when a Mahomedan dies leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court of Calcutta, Madras or Bombay. In such a case, the Court may, upon the application of any person interested in the assets, direct the Administrator-General to apply for letters of administration of the effects of the deceased, if the applicant satisfies the Court that such grant is necessary for the protection of the assets (see s. 10 of the Act, and also s. 11).

(*h*) *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom 241, 255.

(*i*) *Palaniyandi* v. *Veerammal* (1905) 29 Mad. 77 [*held*, it is not], *Nanchand* v. *Yenava* (1904) 28 Bom 630 [*held*, it is not], *Fatehchand* v. *Mahomed* (1894) 16 All. 259 [*held*, it is].

CHAPTER VI.

INHERITANCE—GENERAL RULES.

40. Heritable property.—There is no distinction in the Mahomedan law of inheritance between moveable and immoveable property or between ancestral and self-acquired property.

41. Birth-right not recognized.—The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor (*j*).

Illustration.

A, who has a son *B*, makes a gift of his property to *C*. *B*, alleging that the gift was procured by undue influence, sues *C in A's lifetime* on the strength of his right to succeed to *A*'s property on *A*'s death. The suit must be dismissed, for *B* has no cause of action against *C*. *B* has no cause of action, for he is not entitled to any interest in *A*'s property *during A's lifetime* *Hasan Alli* v. *Nazo* (1889) 11 All. 456, 458. But the gift would be liable to be set aside if the suit was brought *after A*'s death, provided it was brought within the period of limitation: *Mirza Kurratulain* v. *Nawab Nuzhat ud-Dowlah* (1905) 33 Cal. 116, 32 I. A. 244.

The right such as that claimed by *B* in the above illustration is unknown to, and not recognized by, the Mahomedan law (*k*). It is not more than a *spes successionis* that is, an expectation or hope of succeeding to *A*'s property if *B* survived *A*. As observed by the High Court of Allahabad, the Mahomedan law "does not recognize any . . . . interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir in the person entitled to it according to the rule of succession, he possesses no right at all" (*l*).

42. Principle of representation.—According to the Sunni law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will (*m*). According to the Shiah law, it does pass by succession in the cases specified in s. 80 below.

(*j*) *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597 12 I.A. 91; *Humeeda* v. *Budlun* (1872) 17 W. R. 525; *Hasan Ali* v. *Nazo* (1889) 11 All. 456; *Abdool* v. *Goolam* (1905) 30 Bom. 304.

(*k*) *Abdool* v. *Goolam* (1905) 30 Bom. 304.

(*l*) *Hasan Ali* v. *Nazo* (1889) 11 All. 456, 458.

(*m*) *Abdul Wahid* v. *Nuram Bibi* (1885) 11 Cal 597, 607, 12 I. A. 91. Macnaghten, p. 1 s. 9.

[*A*, a Sunni Mahomedan, has two sons, *B* and *C*. *B* dies in the lifetime of *A*, leaving a son *D*. *A* then dies leaving *C*, his son, and *D*, his grandson. The whole of *A*'s property will pass to *C* to the entire exclusion of *D*. It is not open to *D* to contend that he is entitled to *B*'s share as representing *B*: *Moolla Cassim* v. *Moolla Abdul* (1905) 33 Cal. 173, 32 I. A. 177.]

In the case cited above their Lordships of the Privy Council observed: "It is a well known principle of Mahomedan law that if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grand children are entirely excluded from the inheritance by their uncles and their aunts."

If in the case put above, *B* bequeathed any portion of his expectant share in *A*'s property to *X*, the latter would take nothing under the will. "A mere possibility, such as the expectant right of an heir-apparent, cannot pass by succession, bequest or transfer so long as the right has not actually come into existence by the death of the present owner" (*n*).

43. Transfer of spes successionis.—The chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release (*o*).

Illustration.

[*A* has a son *B* and a daughter *C*. *A* pays Rs. 1,000 to *C*, and obtains from her a writing whereby in consideration of Rs. 1,000 received by her from *A*, she renounces her right to inherit *A*'s property. *A* then dies, and *C* sues *B* for her share (one-third) of the property left by *A*. *B* sets up in defence the release passed by *C* to her father. The release is not a defence to the suit and *C* is entitled to her share of the inheritance, for the transfer by her was a transfer merely of a *spes successionis*, and, as such, inoperative. But *C* is bound to bring into account the amount received by her from her father: *Sumsuddin* v. *Abdul Hoosein* (1906) 31 Bom. 165.]

In the Bombay case cited above, the Court said that the rule of Mahomedan law that an heir cannot renounce his right to inherit is not different from the law under the Transfer of the Property Act, 1882. S. 6 (a) of the Act provides that "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

A husband gives immoveable property to his wife in lieu of her dower, and agrees not to claim any share of it as her heir on her death. Is the agreement valid and binding on the husband? The High Court of Allahabad has held that it is binding on the husband (*p*).

44. Life-estate and vested remainder.—(*1*) According to the Sunni law, when property is given or bequeathed to a person for life, and on his death to another person, the first donee is entitled to an absolute estate, and the second donee

(*n*) *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91.

(*o*) *Khanum Jan* v. *Jan Bebee* (1827) 4 Beng. S. D. A. 210; *Samsuddin* v. *Abdul Hossein* (1906) 31 Bom. 165; *Asa Beevi* v. *Karuppan* (1918) 41 Mad. 365, 46 I. C. 35, dissenting from *Kunhi* v. *Kunhi* (1896) 19 Mad. 176. See also *Hurmut-ul-Nissa Begum* v. *Allahdin Khan* (1871) 17 W. R. 108 [P. C.]

(*p*) *Nasir-ul-Haq* v. *Faiyaz-ul-Rahman* (1911) 33 All. 457, 9 I. C. 530.

is not entitled to any interest in the property. The reason is that, according to the Sunni law, a life-grant [*amree* or *umra*] is nothing but a gift and a condition, and the condition being repugnant to the gift, the gift is absolute, but the condition is void, on the principle stated in section 138 below [see ill. (a) below].

(*2*) The rule laid down in sub-sec. (*1*) does not apply to a transfer for consideration. Therefore, an agreement between two persons *A* and *B*, by which it is provided that *A* should take an estate for life in certain property, and that the remainder should on his death pass to *B*, will be given effect to by the Court, if the words used unmistakably indicate an intention to create an estate for life and a vested remainder. If the words used do not unmistakably indicate such an intention, *A* will be deemed to take an absolute estate, for an estate for life and a vested remainder are little known among Sunni Mahomedans [ill. (b)].

(*3*) According to the Shiah law, where property is given or bequeathed to a person for life, and on his death to another person, the interest taken by the first donee in the property is an estate for life, and that taken by the second donee is a vested remainder. The same rule applies to transactions supported by valuable consideration. The Shiah law recognizes estates known in the English law as "estate for life" and "vested remainder" [ill. (c)].

Notes.—According to the English law, when an estate is given to *A* for life, and the remainder to *B*, *A* takes an estate for life and he is called a tenant for life, and *B* takes a vested remainder, and is called a remainderman. As *B* takes a *vested* interest by way of remainder, he can dispose of his interest by transfer *inter vivos* or by will. On his death intestate his interest will pass to his heirs, even if he predeceases *A*. The same is the rule of Shiah law, as held by Jenkins, C.J., and Heaton, J., in *Banoo Begum's* case cited in ill. (c). In two recent cases, Beaman, J., expressed the opinion that the Arabic texts relied upon by the Court in *Banoo Begum's Case* did not support the conclusion drawn by the Court from those texts, and observed that estates for life and vested remainders were unknown to Shiah law as much as to Sunni Law (*q*).

Illustrations.

(a) A gift of a house is made to *A* for life, and on his death to *B*. According to the Sunni law, *A* takes the house absolutely. *B* takes nothing. See the cases cited in ill. (a) to 138 below. According to the Shiah law *A* takes an estate for life and *B* takes the remainder : see *Banoo Begum's Case* cited in ill. (c) below.

(*q*) *Jainabai* v. *Setna* (1910) 34 Bom. 604, 612, 613, 4 I. C. 513; *Casamally* v. *Currimbhai* (1911) 36 Bom. 214, 253-254, 12 I. C. 225.

(b) *B*, a Sunni Mahomedan, sues *A*, his step-mother, to recover certain property of which *A* is in possession. The suit is compromised, and a consent-decree is obtained by which it is provided that *A* should, *during her life-time*, continue to hold possession as *malik* (proprietor) without power of alienation, and that after her death the property should pass to *B*. *B* dies in the life-time of *A* leaving a sister *C*. *Subsequently A* makes a gift of the property to *D*. *A* then dies, and on *A*'s death, *C* sues *D* to recover the property, alleging that under the consent-decree *A* took an estate for life and *B* took a vested remainder, and that *B*'s interest passed to her [*C*] on *B*'s death as *B*'s heir. Upon these facts the Privy Council held, over-ruling *C*'s contention, that *A* took not an estate for life, but an absolute estate, as the words of the decree did not unmistakably indicate an intention to give to *A* an estate for life only: *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91; *Humeeda* v. *Budun* (1872) 17 W. R. 525. See also *Muhammad* v. *Umardaraz* (1906) 28 All. 633.

(c) It is provided by a consent-decree in a suit to which the parties are Shiah Mahomedans that a certain house should be held and enjoyed by *A* for her life, and that after death it should be sold by public auction and the net sale proceeds divided among her step-sons. In this case *A* takes a life-estate, and the step-sons take a definite interest like what is called in English law a vested remainder: *Banoo Begum* v. *Mir Abed Ali* (1908) 32 Bom. 172.

(d) A Sunni Mahomedan, for a nominal consideration of one rupee, granted the Mokurruri lease of certain property to his second wife, with the condition that if she should die childless, it should go to his son by his pre-deceased wife. The second wife had no child. While the grantor was still alive, a decree-holder attached the interest of the son by the pre-deceased wife, and after the grantor's death the interest of the son was sold. The question arose whether the purchaser took any interest in the property. It was decided by their Lordships of the Privy Council that he did. Their Lordships said that the son took under the deed a definite interest like what is called in English law a vested remainder, only that it was liable to be displaced by the event of there being a son of the grantor by his second wife, and that the interest which the son took was not a mere expectancy or a mere contingent or possible right: *Umes Chunder Sircar* v. *Zahoor Fatima* (1890) 17 I. A. 201. It is submitted that this case does not support the view that a vested remainder is recognized by the Sunni law, as seems to have been thought by the High Court of Bombay in *Banoo Begam's Case* cited in ill. (c). All that the Privy Council held was that the interest taken by the son was not a mere expectancy which could neither be attached nor sold, but a definite interest which was attachable and saleable. The question whether a vested remainder is recognized by the Sunni law was not before the Privy Council in that case. See ss. 43 and 137.]

45. Vested inheritance.—A "vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death. The shares have therefore to be determined on the occasion of each death (*r*).

[*A* dies leaving a son *B*, and a daughter *C*. *B* dies before the estate of *A* is distributed leaving a son *D*. In this case, on the death of *A*, two-thirds of the inheritance vests in *B*, and one-third vests in *C*. If the estate of *A* is distributed after *B*'s death the two-thirds which vested in *B* will be allotted to his son *D*.]

(*r*) *Mst. Jawai* v. *Hussain Bakhsh* (1922) 3 Lah. 80, 67 I. C. 154, ('22) A. L. 293.

See Macnaghten, p. 27, s. 96; Rumsey's Mahomedan Law of Inheritance, ch. ix; Rumsey's *Al Sirajiyyah*, 43-44.

46. Joint family.—When the members of a Mahomedan family live in commensality, they do not form a "joint family" in the sense in which that expression is used with regard to Hindus; and in Mahomedan law there is not, as there is in Hindu law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly (*s*).

It is not settled whether the joint Hindu family law or any portion thereof applies to Khojas and Cutchi Memons. See Mulla's "Principles of Hindu Law," 4th ed., sec. 484

47. Homicide.—(*1*) Under the Sunni law, a person who has caused the death of another, whether intentionally or by mistake, negligence, or accident, is debarred from succeeding to the estate of that other.

(*2*) But homicide under the Shiah law is not a bar to succession unless the death was caused intentionally.

Rumsey's *Al Sirajiyyah*, 14

Impediments to inheritance.—The Sirajiyyah sets out four grounds of exclusion from inheritance, namely, (1) homicide, (2) slavery, (3) difference of religion, and (4) difference of allegiance. Homicide, as an impediment to succession, is dealt with in the present section. The second impediment was removed by the enactment of Act V of 1843 abolishing slavery, and the third by the provisions of Act XXI of 1850 (*t*). The bar of difference of allegiance, as contemplated by the Mahomedan system of Jurisprudence (*u*), has no place in Mahomedan law as administered in British India

Of all the disqualifications above enumerated, the effect upon the person subject to any of them is absolute exclusion from the right of inheritance, and upon all others the same as if the disqualified person were actually dead (*v*). But the person incapable of inheriting by reason of the above disqualifications does not exclude others from inheritance (*w*). Thus if *A* dies leaving a son *B*, a grandson *C* by *B*, and a brother *D*, and if *B* has caused the death of *A*, *B* is totally excluded from inheritance, but he does not exclude his son *C*. The inheritance will devolve as if *B* were dead, so that *C*, the grandson, will succeed to the whole estate, *D* being a remote heir.

(*s*) *Hakim Khan* v. *Gool Khan* (1882) 8 Cal. 826; *Suddurtonnessa* v. *Majada Khatoon* (1878) 3 Cal. 694; *Abdool Adood* v. *Mahomed Makmil* (1884) 10 Cal. 562. See also *Abdool Kadar* v. *Bapubhai* (1898) 23 Bom. 188; *Mahomed Amin* v. *Hasan* (1898) 31 Bom. 143; *Mohideen Bee* v. *Syed Meer* (1915) 38 Mad. 1099, 1101, 32 I. C. 1002 [Limitation Act, Art. 123]; *Isap Ahmed* v. *Abhramji* (1917) 41 Bom. 588, 612-613, 41 I. C. 761 [Limitation Act, Art. 127].

(*t*) Section 1 of the Act runs as follows: "So much of any law or usage now in force .. as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion ... shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories." See *Bhagwant Singh* v. *Kallu* (1881) 11 All. 110; *Rupa* v. *Sardar Mirza* (1920) 1 Lah. 376.

(*u*) Difference of allegiance referred to here is 'difference of country, either actual, as between an alien enemy and an alien tributary, or qualified, as between a fugitive and a tributary, or between two fugitive enemies from two different states." Rumsey's *Al Sirajiyyah*, 14.

(*v*) Baillie's Mahomedan Law of Inheritance, p. 31

(*w*) Rumsey's *Al Sirajiyyah*, 27-28

CHAPTER VII.

HANAFI LAW OF INHERITANCE.

* [*Preliminary Note.*—The principal works of authority on the Hanafi Law of Inheritance are the Sirajiyyah, composed by Shaikh Sirajuddin, and the Sharifiyyah, which is a commentary on the Sirajiyyah written by Sayyad Shariff. The Sirajiyyah is referred to in this and subsequent chapters by the abbreviation *Sir.*, and the references are to the pages of Mr. Rumsey's edition of the Translation of that work by Sir William Jones, as that edition is easily procurable. See also Sale's Translation of the Koran, pp. 60, 61 and 80.]

A.—Three Classes of Heirs.

48. Classes of heirs.—There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred:

(1) "Sharers" are those who are entitled to a prescribed share of the inheritance;

(2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;

(3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries (x).

Sir. 12-13. The first step in the distribution of the estate of a deceased Mahomedan, after payment of his funeral expenses, debts, and legacies, is to allot their respective shares *to such of the relations as belong to the class of sharers and are entitled to a share.* The next step is to divide the residue (if any) among *such of the residuaries as are entitled to the residue.* If there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among *such of the distant kindred as are entitled to succeed thereto.* The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased. Thus if a Mahomedan dies leaving a wife *and* distant kindred, the wife as sharer will take her share which is 1/4, and the remaining three-fourths will go to the distant kindred. And if a Mahomedan female dies leaving a husband *and* distant kindred, the husband as sharer will take his share 1/2, and the other half will go to the distant kindred. To take a simple case : *A* dies leaving a mother, a son and a daughter's son. The mother as *sharer* will take her share 1/6, and the son as *residuary* will take the residue 5/6. The daughter's son, being one of the class of *distant kindred,* is not entitled to any share of the inheritance.

(x) *Abdul Serang* v. *Putee Bibi* (1902) 29 Cal. 738.

The question as to which of the relations belonging to the class of sharers, residuaries, or distant kindred, are entitled to succeed to the inheritance depends, on the circumstances of each case. Thus if the surviving relations be a father and a father's father, the father alone will succeed to the whole inheritance to the entire exclusion of the grandfather, though both of them belong to the class of sharers. And if the surviving relations be a son and a son's son, the son alone will inherit the estate, and the son's son will not be entitled to any share of the inheritance, though both belong to the class of residuaries. Similarly, if the surviving relations belong to the class of distant kindred, *e.g.*, a daughter's son and a daughter's son's son, the former will succeed to the whole inheritance, it being one of the rules of succession that the nearer relation excludes the more remote.

49. Definitions:—

(*a*) "True grandfather" means a male ancestor between whom and the deceased no female intervenes.

Thus the father's father, father's father's father and his father how high soever are all true grandfathers.

(*b*) "False grandfather" means a male ancestor between whom and the deceased a female intervenes.

Thus the mother's father, mother's mother's father, mother's father's father, father's mother's father, are all fasle grandfathers.

(*c*) "True grandmother" means a female ancestor between whom and the deceased no false grandfather intervenes.

Thus the father's mother, mother's mother, father's mother's mother, father's father's mother, mother's mother's mother, are all true grandmothers.

(*d*) "False grandmother" means a female ancestor between whom and the deceased a false grandfather intervenes.

Thus the mother's father's mother is a false grandmother. False grandfathers and false grandmothers belong to the class of distant kindred.

(*e*) "Son's son how low soever" includes son's son, son's son's son, and the son of a son how low soever.

(*f*) "Son's daughter how low soever" includes son's daughter, son's son's daughter and the daughter of a son how low soever.

B.—Sharers.

50. Sharers.—After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate of a deceased Mahomedan is to ascertain which of the surviving

Sharers.	Normal Share of one	Normal Share of two or more collectively (a).	Conditions under which the normal share is inherited	This column sets out— (A) Shares of Sharers Nos. 3, 4, 5, 8 and 12 as varied by special circumstances; (B) Conditions under which Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries.
1. FATHER	1/6	..	When there is a child or child of a son h. l. s. ..	[When there is no child or child of a son h. l. s., the father inherits as a residuary: see Tab. of Res., No. 3.]
2. TRUE GRANDFATHER .. [sec. 49, cl. (a)].	1/6	..	When there is a child or child of a son h. l. s., and no father or nearer true grandfather.	[When there is no child or child of a son h. l. s., the Tr. G. F. inherits as a residuary, provided there is no father or nearer Tr. G. F.: see Tab. of Res., No. 4.]
3. HUSBAND	1/4	..	When there is a child or child of a son h. l. s. ..	1/2 when no child or child of a son h. l. s.
4. WIFE (b)	1/8	1/8	When there is a child or child of a son h. l. s. ..	1/4 when no child or child of a son h. l. s.
5. MOTHER	1/6	..	(a) When there is a child or child of a son h. l. s., or .. (b) when there are two or more brothers or sisters, or even one brother *and* one sister, whether full, consanguine or uterine.	1/3 when no child or child of a son h. l. s., and not more than one brother or sister (if any); but if there is also wife or husband *and* the father, then only 1/3 of what remains after deducting the wife's or husband's share.
6. TRUE GRANDMOTHER .. [sec. 49, cl. (c)].	1/6	1/6	A. *Maternal*—when no mother, and no nearer true grandmother either paternal or maternal. B. *Paternal*—when no mother, no father, no nearer true grandmother either paternal or maternal, and no intermediate true grandfather.	
7. DAUGHTER	1/2	2/3	When no son	[With the son she becomes a residuary: see Tab. of Res., No. 1.]
8. SON'S DAUGHTER h. l. s. .. [sec. 49, cl. (f)].	1/2	2/3	When no (1) son, (2) daughter, (3) higher son's son, (4) higher son's daughter, or (5) *equal son's son* (c)	When there is only one daughter, or higher son's daughter but no (1) son, (2) higher son's son, or (3) *equal son's son*, the daughter or higher son's daughter will take 1/2, and the son's daughter h. l. s. (whether one or more) will take 1/6, [*i.e.*, 2/3—1/2]. [With an equal son's son she becomes a residuary: see Tab. of Res., No. 2.]
e.g.,				
(i) SON'S DAUGHTER ..	1/2	2/3	When no (1) son, (2) daughter, or (3) *son's son* ..	When there is only one daughter, the son's daughter (whether one or more) will take 1/6, if there be no son or *son's son*. [With the son's son she becomes a residuary: see Tab. of Res., No. 2.]
(ii) SON'S SON'S DAUGHTER .	1/2	2/3	When no (1) son, (2) daughter, (3) son's son, (4) son's daughter, or (5) *son's son's son*.	When there is only one daughter or son's daughter, the son's son's daughter (whether one or more) will take 1/6, if there be no (1) son, (2) son's son, or (3) *son's son's son*. [With the son's son's sons he becomes a residuary: see Tab. of Res., No. 2.]
9. / 10. UTERINE BROTHER *OR* SISTER.	1/6	1/3	When no (1) child, (2) child of a son h. l. s., (3) father, or (4) true grandfather.	
11. FULL SISTER	1/2	2/3	When no (1) child, (2) child of a son h. l. s., (3) father, (4) true grandfather, or (5) *full brother*.	[With the full brother she becomes a residuary: see Tab. of Res., No. 5.]
12. CONSANGUINE SISTER ..	1/2	2/3	When no (1) child, (2) child of a son h. l. s., (3) father, (4) true grandfather, (5) full brother, (6) full sister, or (7) *consanguine brother*.	But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, provided she is not otherwise excluded from inheritance. [With the consanguine brother she becomes a residuary: see Tab. of Res., No. 7.]

(a) The collective share is always divided *equally* among those to whom it is allotted.

(b) A Mahomedan can have as many as four wives at a time.

(c) If there be a *son's son* and a *son's son's daughter*, the former is a *higher* son's son in relation to the latter. If there be a *son's son's son* and a *son's daughter* the former is a *lower* son's son in relation to the latter. And if there be a *son's son* and a *son's daughter* or a *son's son's son* and a *son's son's daughter*, the former is an *equal* son's son in relation to the latter, both being equally removed from the deceased.

relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying table (p. 34A) contains a list of Sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.

Illustrations.

Note.—The italics in the following and other illustrations in this chapter indicate the surviving relations. It will be observed that the sum total of the sharers in all the following illustrations equals unity :—

Father, Husband and Wife.

(a)	*Father*	.. 1/6	(as *sharer*, because there are daughters)
	Father's father	.. ..	(excluded by father)
	Mother	.. 1/6	(because there are daughters)
	Mother's mother	.. ..	(excluded by mother)
	Two daughters	.. 2/3	
	Son's daughter	.. ..	(excluded by daughters)
(b)	*Husband*	.. 1/2	
	Father	.. 1/2	(as residuary)
(c)	*Four widows*	.. 1/4	(each taking 1/16)
	Father	.. 3/4	(as residuary)

Mother.

(d)	*Mother*	.. 1/3	
	Father	.. 2/3	(as residuary)
(e)	*Mother*	.. 1/6	(because there are *two* sisters)
	Two sisters	.. ..	(excluded by father)
	Father	.. 5/6	(as residuary)

Note that though the sisters do not inherit at all, they affect the share of the mother and prevent her from taking 1/3. This proceeds upon the principle that a person, though excluded from inheritance, may exclude others wholly or partially (Sir. 28). In the present case the exclusion is partial, the mother taking 1/6 instead of 1/3, which latter share she would have taken if the deceased had not left sisters.

(f)	*Mother*	.. 1/3	
	Sister	.. ..	(excluded by father)
	Father	.. 2/3	(as residuary)
(g)	*Mother*	.. 1/6	(because there is a brother and also a sister)
	Brother (f., c., or u.)	.. ..	(excluded by father)
	Sister (f., c., or u.)	.. ..	(excluded by father)
	Father	.. 5/6	(as residuary)

Note.—The mother takes 1/6, and not 1/3, where there are two or more brothers or two or more sisters, or *one brother and one sister*, or two or more brothers and sisters. The brother and the sister, though they are excluded from inheritance by the father, prevent the mother from taking the larger share 1/3. See note to ill. (e).

(h)	*Husband*	1/2	
	Mother	1/6	(=1/3 of 1/2)
	Father	1/3	(as residuary)

Note.—But for the *husband and father*, the mother in this case would have taken 1/3, as there are neither children nor brothers nor sisters. As the deceased has left a husband *and* father, the mother is entitled only to one-third of what remains after the husband's share is allotted to him. The husband's share is 1/2, and what remains is 1/2, and 1/3 of 1/2 is 1/6. The reason of the rule is clear, for if the mother took 1/3, the residue for the father would only be 1—(1/2+1/3)=1/6, that is, half the share of the mother, while as a general rule, the share of a male is twice as much as that of a female of parallel grade (Sir. 22). For the case where the deceased leaves a *widow and father*, see ill. (j) below.

(i)	*Husband*	1/2	
	Mother	1/3	
	Father's father	1/6	(as residuary)

Note.—The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the husband's share.

(j)	*Widow*	1/4	
	Mother	1/4	(=1/3 of 3/4)
	Father	1/2	(as residuary)

Note.—In this case, the mother would have taken 1/3 but for the *widow and father*, for there are neither children nor brothers nor sisters. As the widow *and* father are among the surviving heirs, the mother is entitled to one-third of the remainder after deducting the widow's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4, that is, 1/4. See ill. (h) above and the note thereto.

(k)	*Widow*	1/4	
	Mother	1/3	
	Father's father	5/12	(as residuary)

Note.—The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the widow's share.

True grandfather and true grandmother.

(l)	*Father's mother*		(being a true *pat.* grandmother, is excluded by father)
	Mother's mother	1/6	(being a true *mat.* grandmother, is not excluded by father)
	Father	5/6	(as residuary)
(m)	*Father's mother* .. .. *Mother's mother*	1/6	(each taking 1/12)
	Father's father	5/6	(as residuary)

Note.—The father's mother is not excluded by the father's father, for the latter is not an *intermediate*, but an *equal*, true grandfather.

(n) *Father's father's mother* .. .. (excluded by father's father)
Father's father .. .. .. takes the whole as residuary

Note.—The father's father's mother is excluded by the father's father, for he is an intermediate true grandfather, the father's father's mother being related to the deceased *through* him.

(o) *Father's mother's mother* .. 1/6
Father's father .. .. 5/6 (as residuary)

Note.—The father's mother's mother (who is a true pat. grandmother) is not excluded by the father's father (who is a true grandfather), for though he is nearer in degree, he is *not* in relation to her an *intermediate* true grandfather, as the father's mother's mother is *not related to the deceased through him*, but through the father.

(p) *Father's mother* 1/6
Mother's mother's mother .. .. (excluded by father's mother who is a nearer true grandmother)
Father's father .. .. 5/6 (as residuary)

(q) *Father's mother* .. .. .. (excluded by father)
Mother's mother's mother .. (excluded by father's mother who is a nearer true grandmother)
Father .. .. takes the whole as residuary

Note.—The father's mother, though she is excluded by the father, excludes the mother's mother's mother. This proceeds upon the rule that one who is excluded may himself exclude others wholly or partially. See note to ill. (e) : in that case the exclusion of the mother by the sister was partial, for she *did* take a share, namely, 1/6. In the present case, however, the exclusion of the mother's mother's mother is entire. It need hardly be stated that if the deceased had not left the father's mother, the mother's mother's mother would have taken 1/6, for, being a true *maternal* grandmother, she is not excluded by the father.

Daughters and Sons' daughters h. l. s.

(r) *Father* .. .. 1/6 (as sharer)
Mother 1/6
3 *sons' daughters*, of whom one is by one son and the other two by another son .. .. 2/3 (each taking 2/9)

Note.—The sons' daughters take *per capita* and not *per stirpes*. The two-thirds is not therefore divided into two parts, one for the son's daughter by one son, and the other for the other two by another son, but it is divided into as many parts as there are sons' daughters irrespective of the number of sons through whom they are related to the deceased. The reason is that the Sunni Mahomedan law does not recognize any right of representation (see s. 42), and the sons' daughters do not inherit as representing their respective fathers, but in their own right as grand-daughters of the deceased. The same principle applies to the case of sons' sons, brothers' sons, uncles' sons, etc. See Table of Residuaries.

(s)	*Father*	1/6	(as sharer)
	Mother	1/6	
	Daughter	1/2	
	4 sons' daughters	1/6	(each taking 1/24)

Note.—There being only one daughter, the sons' daughters are not entirely excluded from inheritance, but they take 1/6, which, together with the daughter's 1/2, makes up 2/3, the full portion of daughters.

(t)	*Father*	1/6	(as sharer)
	Mother	1/6	
	2 sons' daughters	2/3	
	Son's son's daughter ..	..	(excluded by sons' daughters)

(u)	*Father*	1/6	(as sharer)
	Mother	1/6	
	Son's daughter	1/2	
	Son's son's daughter ..	1/6	

Note.—The rule of succession as between daughters and sons' daughters applies, in the absence of daughters, as between higher sons' daughters and lower sons' daughters (Sir. 18). There being only one son's daughter in the present illustration, the son's son's daughter is not entirely excluded from inheritance, but she inherits 1/6, which together with the son's daughter's 1/2, makes up 2/3, the full share of sons' daughters in the absence of daughters.

Sisters.

(v)	*Mother*	1/6	
	2 full sisters	2/3	(each taking 1/3)
	C. sister	..	(excluded by full sisters)
	U. sister (*or* u. brother) ..	1/6	
(w)	*2 full sisters* (*or* c. sisters)	2/3	(each taking 1/3)
	u. sisters (*or* u. brothers)	1/3	(each taking 1/6)
(x)	*Full sister*	1/2	
	2 c. sisters	1/6	(each taking 1/12)
	U. brother .. .. .. *U. sister*	1/3	(each taking 1/6)

Note.—There being only one full sister, the consanguine sisters are not excluded from inheritance, but they inherit 1/6 which, together with the sister's 1/2, makes up 2/3, the collective share of full sisters in the inheritance (Sir. 21).

Sir. 14-23. The principal points involved in the Table of Sharers are explained in their proper place in the notes appended to the illustrations. The illustrations must be carefully studied, as it is very difficult to understand the rules of succession without them. The principles underlying the rules of succession are set out in the notes on s. 52 below. It will be observed that the illustrations are so framed that the sum total of the shares does not exceed unity. For cases in which the total of the shares exceeds unity, see the next section.

The sharers are twelve in number. Of these there six that inherit under certain circumstances as residuaries, namely, the father, the true grandfather, the daughter, the son's daughter, the full sister, and the consanguine sister. See the list of Residuaries given in s. 52 below, and the notes on that section.

51. Increase (*Aul*):—If it be found on assigning their respective shares to the Sharers that the total of the shares exceeds unity, the share of each Sharer is proportionately diminished by reducing the fractional shares to a common denominator, and *increasing* the denominator so as to make it equal to the sum of the numerators.

Illustrations.

(a)	*Husband*	1/2=3/6	reduced to	3/7
	2 full sisters	2/3=4/6	,,	4/7
		7/6		1

Note.—The sum total of 1/2 and 2/3 exceeds unity. The fractions are therefore reduced to a common denominator, which, in this case, is 6. The sum of the numerators is 7, and the process consists in substituting 7 for 6 as the denominator of the fractions 3/6 & 4/6. By so doing the total of the shares equals unity. The doctrine of "Increase" is so called because it is by *increasing* the denominator from 6 to 7 that the sum total of the shares is made equal to unity.

(b)	*Husband*	1/2=3/6	reduced to	3/7
	Full sister	1/2=3/6	,,	3/7
	C. sister	1/6=1/6	,,	1/7
		7/6		1

(c)	*2 full sisters*	2/3=4/6	reduced to	4/7
	2 u. brothers (each taking 1/6).. ..	1/3=2/6	,,	2/7
	Mother	1/6=1/6	,,	1/7
		7/6		1

(d)	*Husband*	1/2=3/6	reduced to	3/8
	2 full sisters	2/3=4/6	,,	4/8
	Mother	1/6=1/6	,,	1/8
		8/6		1

(e)	*Husband*	1/2=3/6	reduced to	3/8
	Full sister	1/2=3/6	,,	3/8
	3 u. sisters (each taking 1/9)	1/3=2/6	,,	2/8
		8/6		1

(f)	*Husband*	1/2=3/6	reduced to	3/9
	2 full sisters	2/3=4/6	,,	4/9
	2 u. sisters and 1 *u. brother* (each taking 1/9)	1/3=2/6	,,	2/9
		9/6		1

	Heir	Share		
(g)	*Husband*	1/2=3/6	reduced to	3/9
	Full sister	1/2=3/6	„	3/9
	2 u. sisters and 2 u. brothers (each 1/12)	1/3=2/6	„	2/9
	Mother	1/6=1/6	„	1/9
		9/6		1

	Heir	Share		
(h)	*Husband*	1/2=3/6	reduced to	3/10
	2 full sisters	2/3=4/6	„	4/10
	3 u. sisters and 5 u. brothers (each 1/24)	1/3=2/6	„	2/10
	Mother	1/6=1/6	„	1/10
		10/6		1

	Heir	Share		
(i)	*Widow*	1/4=3/12	reduced to	3/13
	2 c. sisters	2/3=8/12	„	8/13
	Mother	1/6=2/12	„	2/13
		13/12		1

	Heir	Share		
(j)	*Husband*	1/4=3/12	reduced to	3/13
	Mother	1/6=2/12	„	2/13
	2 daughters	2/3=8/12	„	8/13
		13/12		1

	Heir	Share		
(k)	*Husband*	1/4=3/12	reduced to	3/13
	Mother	1/6=2/12	„	2/13
	Daughter	1/2=6/12	„	6/13
	Son's daughter	1/6=2/12	„	2/13
		13/12		1

	Heir	Share		
(l)	*Widow*	1/4=3/12	reduced to	3/13
	Mother	1/3=4/12	„	4/13
	Full sister	1/2=6/12	„	6/13
		13/12		1

	Heir	Share		
(m)	*Widow*	1/4=3/12	reduced to	3/15
	2 full sisters	2/3=8/12	„	8/15
	2 u. sisters	1/3=4/12	„	4/15
		15/12		1

	Heir	Share		
(n)	*Widow*	1/4=3/12	reduced to	3/15
	2 full sisters	2/3=8/12	„	8/15
	U. sister	1/6=2/12	„	2/15
	Mother	1/6=2/12	„	2/15
		15/12		1

I.—*DESCENDANTS:*

1. **SON.**

DAUGHTER takes as a residuary with the son, the son taking a double portion.

2. **SON'S SON h. l. s.**—the nearer in degree excluding the more remote. [Two or more sons' sons inherit in equal shares].

SON'S DAUGHTER h. l. s. takes as a residuary with an *equal* son's son. If there be no *equal* son's son, but there is a *lower* son's son, she takes as a residuary with him, *provided she cannot inherit as a sharer* [see ill. (k)]. In either case, each son's son h. l. s. takes double the share of each son's daughter h. l. s.

Note.—When the son's daughter h. l. s. becomes a residuary with a *lower* son's son, and there are son's daughters h. l. s. equal in degree with the *lower* son's son, she shares equally with them as if they were all of the same grade [see ill. (m)].

II.—*ASCENDANTS:*

3. **FATHER.**

4. **TRUE GRANDFATHER h. h. s.**—the nearer in degree excluding the more remote.

III.—*DESCENDANTS OF FATHER:*

5. **FULL BROTHER.**

Full Sister—takes as a residuary with full brother, the brother taking a double portion.

6. **FULL SISTER**—In default of full brother and the other residuaries above-named, the full sister takes the residue *if any*, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h. l. s., or even if there be (3) *one* daughter *and* a son's daughter or daughters h. l. s. See Sir. pp. 24-25.

7. **CONSANGUINE BROTHER.**

Consanguine sister takes as a residuary with consanguine brother, the brother taking a double portion.

8. **CONSANGUINE SISTER**—In default of consanguine brother and the other residuaries above-named, the consanguine sister takes the residue, *if any*, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h. l. s., or even if there be (3) *one* daughter *and* a son's daughter or daughters h. l. s. * See Sir. pp. 24-25.

9. **FULL BROTHER'S SON.**

10. **CONSANGUINE BROTHER'S SON.**

11. **FULL BROTHER'S SON'S SON.**

12. **CONSANGUINE BROTHER'S SON'S SON.**

Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 11, then the son's son of No. 12, and so on in like order.

IV.—*DESCENDANTS OF TRUE GRANDFATHER* **h. h. s.:**

13. **FULL PATERNAL UNCLE.**

14. **CONSANGUINE PATERNAL UNCLE.**

15. **FULL PATERNAL UNCLE'S SON.**

16. **CONSANGUINE PATERNAL UNCLE'S SON.**

17. **FULL PATERNAL UNCLE'S SON'S SON.**

18. **CONSANGUINE PATERNAL UNCLE'S SON'S SON.**

Then come remoter male descendants of Nos. 17 and 18, in like order and manner as descendants of Nos. 11 and 12.

MALE DESCENDANTS OF MORE REMOTE TRUE GRANDFATHERS—in like order and manner as the deceased's paternal uncles and their sons and sons' sons.

(o)	*Husband*	1/4=3/12 reduced to	3/15
	Father	1/6=2/12 ,,	2/15
	Mother	1/6=2/12 ,,	2/15
	3 daughters	2/3=8/12 ,,	8/15
		15/12	1

(p)	*Widow*	1/4=3/12 reduced to	3/17
	2 full sisters	2/3=8/12 ,,	8/17
	2 u. sisters	1/3=4/12 ,,	4/17
	Mother	1/6=2/12 ,,	2/17
		17/12	1

(q)	*Wife*	1/8=3/24 reduced to	3/27
	2 daughters	2/3=16/24 ,,	16/27
	Father	1/6=4/24 ,,	4/27
	Mother	1/6=4/24 ,,	4/27
		27/24	1

Sir. 29-30. For cases in which the total of the shares is less than unity, see s. 53 below.

C.—*Residuaries.*

52. **Residuaries.**—If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 40A).

Illustrations.

[*Note.*—The residue remaining after satisfying the sharers' claims is indicated in the following illustrations thus.]

No. 1. Sons and daughters.

(a) *Son* .. .. 2/3 } (as residuaries)
Daughter .. .. 1/3 }

Note.—The daughter cannot inherit as a sharer when there is a son. But if the heirs be a daughter and a son's son, the daughter as a *sharer* will take 1/2, and the son's son as a residuary will take the residue 1/2.

(b) *2 sons* .. .. 4/7 (as residuaries, each son taking 2/7)
3 daughters .. 3/7 (as residuaries, each daughter taking 1/7)

(c) *Widow* .. .. 1/8 (as sharer)
Son .. .. 2/3 of (7/8)=7/12 } (as residuaries)
Daughter .. .. 1/3 of (7/8=7/24 }

Note.—The residue after payment of the widow's share is 7/8.

(d)	*Husband* ..	.. .. .. 1/4	(as sharer)
	Mother ..	.. .. .. 1/6	(as sharer)*
	Son ..	..2/3 of (7/12)=7/18	(as residuaries)
	Daughter ..	..1/3 of (7/12)=7/36	

Note.—The residue in the above case is 1—(1/4+1/6)=7/12. If there were two sons and three daughters, each son would take 2/7 of $\frac{7}{12}$=1/6, and each daughter 1/7 of 7/12=1/12.

No. 2. Son's sons. h. l. s. and Sons' daughters h. l. s.

(e)	*Son's son* ..	.. . .. 2/3	(as residuaries)
	Son's daughter	.. . .. 1/3	

Note.—Where there is a son's son, the son's daughter cannot inherit as a sharer, but she inherits as a residuary with him. Similarly, a son's son's daughter cannot inherit except as a residuary when there is a son's son's son.

(f)	*2 daughters*	.. .. . 2/3	(as sharers)
	Son's son ..	.. . . 1/3	(as residuary)
	Son's son's son	.. . .	(excluded by son's son)
	Son's son's daughter	.. .	(excluded both by daughters and son's son. See Tab. of Sh., No. 8)

(g)	*2 daughters*	.. .. .. 2/3	(as sharers)
	Son's son ..	.. 2/3 of (1/3)= 2/9	(as residuaries)
	Son's daughter	.. 1/3 of (1/3)= 1/9	

(h)	*Daughter* ..	.. .. .. 1/2	(as sharer)
	Son's son ..	.. 2/3 of (1/2) = 1/3	(as residuaries)
	Son's daughter	.. 1/3 of (1/2)= 1/6	

Note.—There being only one daughter, the son's daughter would have taken 1/6 as *sharer* (see Tab. of Sh., No. 8), if the deceased had not left a son's son. But as the son's son is one of the heirs, the son's daughter can inherit only as a *residuary* with the son's son.

(i)	*Son's daughter*	.. .. .. 1/2	(as sharer)
	Son's son's son	.. .. .. 1/2	(as residuary)

Note.—In this case the son's daughter is not precluded from inheriting as a *sharer*, for there is none of those relations that precludes her from succeeding as a sharer (see Tab. of Sh., No. 8, 2nd column). And it will be seen on referring to the Table of Residuaries that the only case in which the son's daughter inherits as a residuary with the son's son's son (who is a *lower* son's son) is where she is precluded from succeeding as a sharer [see ill. (k) below].

(j)	*Daughter* ..	.. .. .. 1/2	(as sharer)
	Son's daughter	.. .. .. 1/6	(as sharer, see Tab. of Sh., No. 8)
	Son's son's son	.. 2/3 of (1/3)= 2/9	(as residuaries)
	Son's son's daughter	1/3 of (1/3)= 1/9	

Note.—There being only one daughter, the son's daughter is entitled to 1/6 as a sharer. Since she is not precluded from inheriting as a sharer, she does not become a residuary with the son's son's son (who is a *lower* son's son).

(k)	*2 daughters*	2/3	(as sharers)
	Son's daughter ..	1/3 of (1/3)=1/9	(as residuaries)
	Son's son's son ..	2/3 of (1/3)=2/9	

Note.—There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a *lower* son's son).

(l)	*2 son's daughters*	2/3	(as sharers)
	Son's son's son ..	2/3 of (1/3)=2/9	(as residuaries)
	Son's son's daughter	1/3 of (1/3)=1/9	

Note.—The son's daughter in this case do not inherit as residuaries with the son's son's son, for they are not precluded from inheriting as sharers.

(m)	*2 daughters*	2/3	(as sharers)
	Son's son's son ..	2/4 of (1/3)=1/6	(as residuaries)
	Son's daughter ..	1/4 of (1/3)=1/12	
	Son's son's daughter..	1/4 of (1/3)=1/12	

Note—There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a *lower* son's son). The son's son's daughter is entitled to inherit as a residuary with the son's son's son who is an *equal* son's son in relation to her. Both these female relations inherit therefore as residuaries with the son's son's son, each taking 1/12. This illustration presents two peculiar features. The one is that the son's son's daughter, though remoter in degree, shares with the son's daughter. The other is that the son's daughter succeeds as a residuary with a *lower* son's son. If this were not so, the son's son's daughter would inherit to the exclusion of the son's daughter, a result directly opposed to be principle that the nearest of blood must take first (Sir. 18-19).

No. 3. Father.

(n)	*Father*	1/6	(as sharer)
	Son (*or* son's son h. l. s.)	5/6	(as residuary)

Note.—Here the father inherits as a sharer. See Table of Sh., No. 1.

(o)	*Mother*	1/3	(as sharer)
	Father	2/3	(as residuary)

Note.—Here the father inherits as a residuary, as there is no child or child of a son h. l. s. See Tab. of Sh., No. 1.

(p)	*Daughter*	(as sharer)=1/2
	Father .. .. ..1/6 (as sharer)+1/3 (as residuary)	=1/2

Note.—Here the father inherits both as a sharer and residuary. He inherits as a sharer, for there is a daughter, and he inherits the residue 1/3 as a residuary, for there are neither sons nor sons' sons h. l. s. The father may inherit *both* as a sharer and residuary. He inherits simply as a sharer when there is a son or son's son h. l. s. [see ill. (n) above]. He inherits simply as a residuary when there are neither children nor children of sons h. l. s. [see ill. (o) above]. He is both a sharer and a residuary when there are only daughters or son's daughters h. l. s.), but no sons or sons' sons h. l. s. as in the present illustration. The same remarks apply to the true grandfather h. h. s. In fact, the father and the true grandfather are the only relations that can inherit in both capacities simultaneously.

No. 4. True grandfather h. h. s.

Note.—Substitute "true grandfather" for "father" in ills. (n), (o) and (p). The true grandfather will succeed in the same capacity and will take the same share as the father in those illustrations.

Nos. 5 and 7. Brothers and sisters.

(q)	*Husband*	1/2	(as sharer)
	Mother	1/6	(as sharer)
	Brother . ..	2/3 of (1/3)=2/9	(as residuaries)
	Sister	1/3 of (1/3)=1/9	

Note.—The sister cannot inherit as a sharer when there is a brother, but she takes the residue with him.

Full Brother (y)	1/2	(as residuary)
Full sister	1/2	(as residuary)
Cons. sister		(excluded by full brother)

No. 6. Full sisters with daughters and sons' daughters.

(r)	*Daughter* (*or* son's daughter h.l.s.).	1/2	(as sharer).
	Full sister	1/2	(as residuary No. 6)
	Brother's son	0	(excluded by full sister who is a nearer residuary)

Note.—The full sister inherits in three different capacities: (1) as a sharer under the circumstances set out in the Table of Sharers; (2) as a residuary with full brother when there is a brother, and, failing to inherit in either of these two capacities; (3) as a residuary with daughters, or son's daughters h. l. s or one daughter and a son's daughter h. l. s. provided there is no nearer residuary. Thus in the present illustration, the sister cannot inherit as a sharer, because there is a daughter (or son's daughter h. l. s.). And as there is no brother, she cannot inherit in the second of the three capacities enumerated above. She therefore takes the residue 1/2 as a residuary with the daughter (or son's daughter), for there is no residuary nearer in degree. If this were not so, the brother's son, who is a more remote relation, would succeed in preference to her.

(s)	*2 daughters* (*or* son's daughters h. l. s.)	2/3	(as sharers)
	Full sister	1/3	(as residuary No. 6)
(t)	*2 daughters* (z)	2/3	(as sharers)
	Husband	1/4	(as sharer)
	Full sister	1/12	(as residuary No. 6)
	Father's pat. uncle's son	0	(excluded by full sister who is a nearer residuary)
(u)	*Daughter*	1/2	(as sharer)
	Son's daughter	1/6	(as sharer)
	Full sister	1/3	(as residuary No. 6)
(v)	*Daughter*	1/2	(as sharer)
	Son's daughter	1/6	(as sharer)
	Mother	1/6	(as sharer)
	Full sister	1/6	(as residuary No. 6)

(y) *Abdul Karim* v. *Mst. Amat-ul-Habib* (1922) 3 Lah. 397, 70 I. C. 205, ('23) AL. 121.
(z) *Meherjan* v. *Shajadi* (1899) 24 Bom. 112.

(w)	*Daughter*	1/2 (as sharer)	
	Son's daughter	1/6 (as sharer)	
	Husband	1/4 (as sharer)	
	Full sister	1/12 (as residuary No. 6)	

(x)	*Daughter*	1/2 (as sharer)=6/12	reduced to	6/13
	Son's daughter	1/6 (as sharer)=2/12	,,	2/13
	Husband	1/4 (as sharer)=3/12	,,	3/13
	Mother	1/6 (as sharer)=2/12	,,	2/13
	Full sister	0 (excluded)		
		13/12		1

Note.—Here the only capacity in which the full sister could inherit is that of a residuary with the daughter and son's daughter. But the residuary succeeds to the residue, *if any*, after the claims of the sharers are satisfied, and in the present case there is no residue. The sum total of the shares exceeds unity, and the case is one of "Increase."

No. 8. Consanguine sisters with daughters and sons' daughters h. l. s.

Note.—Consanguine sisters inherit as residuaries with daughters and son's daughters in the absence of full sisters. Substitute "consanguine sister" for "full sister" in ills. (r) to (x), and the shares of the several heirs will remain the same, the consanguine sister taking the place of the full sister. Substitute also in the note to ill. (r) "consanguine brother" for "full brother."

Other Residuaries.

(y)	*Full sister*	1/2	(as sharer)
	C. sister	1/6	(as sharer)
	Mother	1/6	(as sharer)
	Brother's son . ..	1/6	(as residuary)
(z)	*Widow*	1/4	(as sharer)
	Mother	1/3	(as sharer)
	Pat. uncle	5/12	(as residuary)
(aa)	*Full sister* (*a*)	1/2	(as sharer)
	Pat. uncle's sons . .	1/2	(as residuaries)

Sir. 18-21, and 23-26. Some of the important points involved in the Table of Residuaries are explained in the notes appended to the illustrations.

Classification of Residuaries.—All residuaries are related to the deceased *through a male*. The uterine brother and sister are related to the deceased through a female, that is, mother, and they do not therefore find place in the list of Residuaries. The Sirajiyyah divides residuaries into three classes, *viz*, (1) residuaries *in their own right*: these are all males comprised in the List of Residuaries; (2) residuaries *in the right of another*: these are the four female residuaries, namely, the daughter as a residuary in the right of the son, the son's daughter h. l. s. as a residuary in the right of the son's son h. l. s., the full sister in the right of the full brother, and the consanguine sister in the right of the consanguine brother; and (3) residuaries *with* others, namely, the full sister and consanguine sister, when they inherit as residuaries *with* daughters and sons' daughters h. l. s. But if regard is to be had to the *order* of succession, residuaries may be divided into four classes, the first class comprising descendants of the deceased, the second class his ascendants, the third the descendants of the deceased's

(*a*) *Mst. Ghulam* v. *Nur Hasan* (1922) 3 Lah. 278, ('22) AL. 406, 63 I. C. 1000.

father and the fourth the descendants of the deceased's true grandfather h. h. s. This classification has been adopted in the Table of Residuaries. The division of Distant Kindred into four classes proceeds upon the same basis.

Residuaries that are primarily Sharers.—It will be noticed on referring to the Tables of Sharers and Residuaries that there are six sharers who inherit under certain circumstances as residuaries. These are the father and true grandfather h. h. s., the daughter and son's daughter h. l. s., and the full sister and consanguine sister. Of these, only the father and true grandfather inherit in certain events both as sharers and residuaries (see ill. (p) above, and the note thereto). In fact they are the only relations that can inherit at the same time in a double capacity. The other four, who are all females, inherit either as sharers or residuaries. The circumstances under which they inherit as sharers are set out in the Table of Sharers. They succeed as residuaries, and can succeed in that capacity alone, when they are combined with male relations of a parallel grade. Thus the daughter inherits as a *sharer* when there is no son. But when there is a son, she inherits as a *residuary*, and can inherit in that capacity alone: not that when there is a son she is excluded from inheritance, but that in that event she succeeds as a residuary, the presence of the son merely altering the character of her heirship. Similarly, the son's daughter h. l. s. inherits as a residuary when there is an *equal* son's son. And in like manner, the full sister and consanguine sister succeed as residuaries when they co-exist with the full brother and consanguine brother respectively. The curious reader may ask why it is that the said four female relations are precluded from inheriting as *sharer* when they exist with males of parallel grade. The answer appears to be this, that if they were allowed to inherit as sharers under those circumstances, it might be that no residue would remain for the corresponding males (all of whom are residuaries only), that is to say, though the females would have a share of the inheritance, the corresponding males, though of an equal grade, might have no share of the inheritance at all. To take an example: *A* dies leaving a husband, a father, a mother, a daughter, and a son. The husband will take 1/4, the father 1/6, and the mother 1/6. If the daughter were allowed to inherit as a sharer, her share would be 1/2, and the total of the shares would then be 13/12, so that no residue would remain for the son. It is, it seems, to maintain a residue for the males that the said females are precluded from inheriting as sharers when they co-exist with corresponding male relations.

The principle which regulates the successions of full and consanguine sisters as residuaries with daughters and sons' daughters h. l. s., is explained in the notes appended to ill. (r).

Female residuaries.—There are two more points to be noted in connection with female residuaries, which are stated below:

(1) The female residuaries are four in number, of whom two are descendants of the deceased, namely, the daughter and son's daughter h. l. s., and the other two are descendants of the deceased's father, namely, the full sister and consanguine sister. *No other female can inherit as a residuary.*

(2) All the four females inherit as residuaries with corresponding males of a *parallel* grade. But none of these except the son's daughter h. l. s. can succeed as a residuary with a male *lower* in degree than herself. Thus the daughter cannot succeed as a residuary with the son's son, nor the sister with the brother's son; but the son's daughter may inherit as a residuary not only with the son's son but with the son's son's son or other lower son's son: see ill. (m) and the note thereto.

Principles of succession among Sharers and Residuaries.—It will be seen from the Tables of Sharers and Residuaries that certain relations entirely exclude others from inheritance. This proceeds upon certain principles, of which the following two are set out in the Sirajiyyah :

(1) "*Whoever is related to the deceased through any person shall not inherit while that person is living.*"—(Sir. 27.) Thus the father excludes brothers and sisters. And since uterine brothers and sisters are related to the deceased through the mother, it must follow that they should be excluded by the mother. A reference, however, to the Table of Sharers will show that these relations are not excluded by the mother. The reason is that the mother, when she stands alone, is not entitled to the whole inheritance in one and the *same capacity* as the father would be if he stood alone, but partly as a sharer and partly by "Return" (Sir. 27 : Sharifiyyah, 49). Thus if the father be the sole surviving heir he will succeed to the whole inheritance as a *residuary*. But if the mother be the sole heir she will take 1/3 as *sharer*, and the remaining 2/3 by *Return* (see s. 53 below). For this reason the mother does not exclude the uterine brother and sister from inheriting with her.

(2) "*The nearer in degree excludes the more remote.*"—(Sir. 27.) The exclusion of the true grandfather by the father, of the true grandmother by the mother, of the son's son by the son, etc., rests upon this principle. These cases may also be referred to the first principle set out above.

It will have been seen that the daughter, though she is nearer in degree, does not exclude the brother's son or his son. Thus if the surviving relations be a daughter and a brother's son, the daughter takes 1/2, and the brother's son takes the residue. The reason is that the daughter in this case inherits as a *sharer*, and the brother's son as a *residuary*, and the principle laid down above applies only *as between relations belonging to the same class of heirs*. The above principle may, therefore, be read thus : "*Within the limits of each class of heirs*, the nearer in degree excludes the more remote."

Again, it will have been seen that the father, though nearer in degree, does not exclude the mother's mother or her mother ; nor does the mother exclude the father's father or his father. The reason is that the above principle is to be read with further limitations, which we shall proceed to enumerate. These limitations are nowhere stated in the Sirajiyyah nor in any other work of authroity, but they appear to have been tacitly recognised in the rules governing succession among Sharers and Residuaries.

There are five heirs that are *always* entitled to some share of the inheritance, and they are in no case liable to exclusion. These are (1) the child, *i.e.*, son or daughter, (2) father, (3) mother, (4) husband, and (5) wife (Sir. 27). These are the most favoured heirs, and we shall call them, for brevity's sake, Primary Heirs. Next to these, there are three, namely, (1) child of a son, h. l. s., (2) true grandfather h. h. s. and (3) true grandmother h. h. s. These three are the *Substitutes* of the corresponding primary heirs. The husband and wife can have no substitute. The following two lines indicate at a glance the primary heirs and their substitutes :—

Primary heirs	..Child.	Father.	Mother.
Substitutes	..Child of a son h. l. s.	Tr. GF.	Tr. GM.

The right of succession of the substitutes is governed by the following rules :—

(1) No substitute is entitled to succeed so long as there is the corresponding primary heir. To this there is an exception, and that is when there is no son, but a daughter

and a son's daughter in which case the daughter takes ½, and the son's daughter (though a substitute) takes 1/6: see. Tab. of Sh., No. 8.

(2) The child of a son h. l. s. is always entitled to succeed, when there is no child.

(3) The Tr. GF. is always entitled to succeed, when there is no father.

(4) The mother's mother is always entitled to succeed, when there is no mother. The father's mother is always entitled to succeed, if there be no mother and no father.

(5) All relations who are excluded by primary heirs are also excluded by their substitutes. Thus full and consanguine sisters and uterine brothers and sisters are excluded by the *child* and the *father*. They are also excluded therefore by the *child of a son h. l. s.*, and by the true *grandfather* (*b*).

Residue.—The son, being a residuary, is entitled to the *residue* left after satisfying the claims of sharers. At the same time it must have been seen that a son is *always* entitled to some share of the inheritance. To enable the son to participate in the inheritance *in every case*, it is necessary that some residue must always be left when the son is one of the surviving heirs, and this, in fact, is always so; for the shares are so arranged and the rules of succession are so framed that when the son is one of the heirs, some residue invariably remains. And since in the absence of the father the true grandfather h. h. s. is entitled to some participation in the inheritance, it will be found that in every case where he is one of the surviving heirs some residue is always left. No case of "Increase" can therefore take place when these residuaries are amongst the surviving heirs.

53. **Return.**—If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called "Return."

Exception.—Neither the husband nor wife is entitled to the *Return* so long as there is any other heir, whether he be a Sharer or a Distant Kinsman. But if there be no other heir, the residue will go to the husband or wife, as the case may be, by *Return*.

Illustrations.

(a) A Mahomedan dies leaving a widow as his sole heir. The widow will take 1/4 as sharer, and the remaining 3/4 by *Return*. *The surplus 3/4 does not escheat to the Crown*: *Mahomed Arshad* v. *Sajida Banoo* (*c*); *Bafatun* v. *Bilaiti Khanum* (*d*); *Mir Isub* v. *Isab* (*e*).

(b) *Husband* 1/2
Mother .. .. 1/2 (1/3 as sharer and 1/6 by Return)

(*b*) It may here be stated that though, according to the opinion of Abu Hanifa, the true grandfather excludes brothers and sisters whether full or consanguine, he does not exclude them according to the view of Abu Yusuf and Muhammad, but is put to his election as between certain shares (Sir. 40-42). But the latter view is not generally adopted, and it is unnecessary to set it out here.

(*c*) (1878) 3 Cal. 702.

(*d*) (1903) 30 Cal. 683.

(*e*) (1920) 44 Bom. 947, 58 I. C. 48.

Note.—The husband is not entitled to the *Return*, as there is another sharer, the mother. The surplus 1/6 will therefore go to the mother by *Return.*

(c)	*Husband*	1/4
	Daughter	3/4 (1/2 as sharer and 1/4 by Return)

(d)	*Wife*	1/4
	Sister (f or c.)	3/4 (1/2 as sharer and 1/4 by Return)

(e)	*Wife*	1/8
	Son's daughter	7/8 (1/2 as sharer and 3/8 by Return)

(f)	*Mother*	1/6	increased to	1/4
	Son's daughter	1/2=3/6	,,	3/4
		4/6		1

Note.—In this and in illustrations (g) to (k) it will be observed that neither the husband nor wife is among the surviving heirs. The rule in such a case is to reduce the fractional shares to a common denominator, and to decrease the denominator of those shares so as to make it equal to the sum of the numerators. Thus in the present illustration, the original shares, when reduced to a common denominator, are 1/6 and 3/6. The total of the numerators is 1+3=4, and the ultimate shares will therefore be 1/4 and 3/4 respectively.

(g)	*Father's mother* .. .. .. } *Mother's mother* .. .. .. }		1/6	increased to	1/5 (each taking 1/10)
	2 daughters .. .	2/3=	4/6	,,	4/5
			5/6		1

(h)	*Mother*		1/6	increased to	1/5
	Daughter	1/2=	3/6	,,	3/5
	Son's daughter		1/6	,,	1/5
			5/6		1

(i)	*Father's mother* .. .. .. } *Mother's mother* .. .. .. }		1/6	increased to	1/5
	Full sister	1/2=	3/6	,,	3/5
	C. sister		1/6	,,	1/5
			5/6		1

(j)	*Full sister*	1/2=	3/6	increased to	3/5
	C. sister		1/6	,,	1/5
	U. sister		1/6	,,	1/5
			5/6		1

(k)	*Mother*		1/6	increased to	1/5
	Full sister	1/2=	3/6	,,	3/5
	U. brother		1/6	,,	1/5
			5/6		1

	Heir		Share		Ultimate share
(l)	*Husband*		1/4		=4/16
	Mother		1/6	increased to 1/4 of (3/4)	=3/16
	Daughter	1/2=	3/6	,, 3/4 of (3/4)	=9/16
			11/12		1

Note.—In this and in ills. (m) to (r), it will be observed that either the husband or wife is one of the surviving heirs. Since neither the husband nor wife is entitled to the Return when there are other sharers, his or her share will remain the same, and the shares of the other sharers will be increased by reducing them to a common denominator, and then decreasing the denominator of the original fractional shares so as to make it equal to the sum of the numerators, and multiplying the new fractional shares thus obtained by the residue after deducting the husband's or wife's share. Thus in the present illustration the shares of the mother and daughter, when reduced to a common denominator, are 1/6 and 3/6 respectively. The total of the numerators is 1+3=4, and the new fractional shares will thus be 1/4 and 3/4 respectively. The residue after deducting the husband's share is 3/4, and the ultimate shares of the mother and daughter will therefore be 1/4 of 3/4=3/16 and 3/4 of 3/4=9/16 respectively.

	Heir		Share		Ultimate share
(m)	*Wife*		1/8		= 4/32
	Mother		1/6	increased to 1/4 of (7/8)	= 7/32
	Daughter	1/2=	3/6	,, 3/4 of (7/8)	=21/32
			19/24		1
(n)	*Wife*		1/8		= 5/40
	Mother		1/6	increased to 1/5 of (7/8)	= 7/40
	2 sons' daughters		4/6	,, 4/5 of (7/8)	=28/40
			23/24		1
(o)	*Husband*		1/2		= 2/4
	U. brother		1/6	increased to 1/2 of (1/2)	= 1/4
	U. sister		1/6	,, 1/2 of (1/2)	= 1/4
			5/6		1
(p)	*Wife*		1/4		= 2/8
	U. brother		1/6	increased to 1/2 of (3/4)	= 3/8
	U. sister		1/6	,, 1/2 of (3/4)	= 3/8
			7/12		1
(q)	*Wife*		1/4		= 4/16
	Full sister	1/2=	3/6	increased to 3/4 of (3/4)	= 9/16
	C. sister		1/6	,, 1/4 of (3/4)	= 3/16
			11/12		1
(r)	*Wife*		1/4		= 1/4
	U. brother		1/6	increased to 1/3 of (3/4)	= 1/4
	U. sister		1/6	,, 1/3 of (3/4)	= 1/4
	Mother		1/6	,, 1/3 of (3/4)	= 1/4
			9/12		1

(s) *Husband* 1/2
Daughter's son 1/2

Note.—The daughter's son belongs to the class of distant kindred. The husband is not therefore entitled to the surplus by Return and the same will go to the daughter's son as a distant kinsman.

(t) *Wife* 1/4
Brother's daughter 3/4

Note.—The brother's daughter belongs to the class of distant kindred. The surplus will therefore go to her, as the wife is not entitled to the Return (*f*).]
Sir. 37-40.

Residuaries for special cause—A residuary for special cause is a person who inherits from a freedman by reason of the manumission of the latter (*g*). According to Mahomedan law proper, if a manumitted slave dies without leaving any residuary heir by relation, the manumitter is entitled to succeed to the residue in preference to the right of the sharers to take the residue by Return (Sir. 25-26). But residuaries for special cause have no place in Mahomedan law as administered by the Courts of British India since the abolition of slavery in 1843.

Husband and wife—The rule of law as stated in the exception as regards the right of the husband and wife to Return is different from that set out in the Sirajiyyahi. According to the latter authority, neither the husband nor wife is entitled to the Return *in any case*, not even if there be no other heir, and the surplus goes to the Public Treasury (Sir. 37). "But although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred," and this practice has been adopted by our Courts. See the cases cited in ill. (a) above.

"*Return*" *distinguished from* "*Increase*."—Return is the converse of Increase. The case of Return takes place when the total of the shares is *less* than unity: the case of Increase, when the total is *greater* than unity. In the former case the shares undergo a rateable increase; in the latter, a rateable decrease.

Father and true grandfather.—When there is only one sharer, he succeeds to the whole inheritance, to his legal share as sharer, and to the surplus by Return. When the father is the sole surviving heir, he succeeds to the whole inheritance as a *residuary*, for he cannot inherit as a sharer when there is no child or child of a son h. l. s. (see Table of Sh., No. 1) The same remarks apply to the case of the true grandfather when he is the sole surviving heir.

D.—Distant Kindred.

54. Distant Kindred.—(*1*) If there be no sharers or Residuaries, the inheritance is divided amongst Distant Kindred.

(*2*) If the only sharer be a husband or wife, and there be no relation belonging to the class of Residuaries, the

(*f*) See *Koonari* v. *Dalim* (1882) 11 *Calc.* 14. | (*g*) Rumsey's Moohummudan Law of Inheritance, 164.

husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred.

Sir. 13. It will have been seen from the preceding section that a husband or wife, though a sharer, does not exclude distant kindred from inheritance when he or she is the sole surviving heir. See s. 53 and ills. (s) and (t) to that section.

55. Four classes.—(*1*) Distant Kindred are divided into four classes, namely, (1) descendants of the deceased other than sharers and residuaries; (2) ascendants of the deceased other than sharers and residuaries; (3) descendants of parents other than sharers and residuaries; and (4) descendants of ascendants how high soever other than residuaries. The descendants of the deceased succeed in priority to the ascendants, the ascendants of the deceased in priority to the descendants of parents, and the descendants of parents in preference to the descendants of ascendants.

(*2*) The following is a list of Distant Kindred comprised in each of the four classes :—

I. Descendants of the deceased :—

1. Daughter's children and their descendants.
2. Children of son's daughters h. l. s and their descendants.

II. Ascendants of the deceased :—

1. False grandfathers h. h. s.
2. False grandmothers h. h. s

III. Descendants of parents :—

1. Full brothers' daughters and their descendants.
2. Con. brothers' daughters and their descendants.
3. Uterine brothers' children and their descendants.
4. Daughters of full brothers' sons h. l. s., and their descendants.
5. Daughters of con. brothers' sons h.l.s., and their descendants.
6. Sisters' (f., c., or ut.) children and their descendants.

IV. Descendants of *immediate* grandparents (true or false) :—

1. Full pat. uncles' daughters and their descendants.
2. Con. pat. uncles' daughters and their descendants.
3. Uterine pat. uncles and their children and their descendants.
4. Daughters of full pat. uncles' sons h.l. s. and their descendants.

5. Daughters of con. pat. uncles' sons h. l. s., and their descendants.
6. Pat. aunts (f., c., or ut.) and their children and their descendants.
7. Mat. uncles and aunts and their children and their descendants.

and

descendants of *remoter* ancestors h. h. s. (true or false).

(3) The order of precedence among Distant Kindred in each class and the rules by which such order is determined are given in secs. 56 to 66.

Sir. 44-46. The Sirajiyyah does not enumerate all relations belonging to the class of Distant Kindred, but mentions only some of them. Hence it was thought at one time that "distant kindred" were restricted to the specific relations mentioned in the Sirajiyyah. But this view has long since been rejected as erroneous, and it is now firmly established that all relations who are neither sharers nor residuaries are distant kindred (*h*).

Class I of Distant Kindred.

Preliminary Note.—When we come to Distant Kindred, we find that there are two sets of rules for each class, one for determining the order of succession, and the other for determining the sharers. In each class we have first to determine which of the relations are entitled to succeed; this is done by applying certain rules which are called Rules of Exclusion. After so doing, we have to assign shares to those relations; this is done with the help of certain other rules.

It is when we come to the class of Distant Kindred that we find a remarkable difference of opinion between Abu Yusuf and Imam Muhammad, the two great disciples of Abu Hanifa. The doctrine of Abu Yusuf is very simple, but unhappily it has not been accepted by the Hanafi Sunnis in India. It is the doctrine of Imam Muhammad that is followed in India, and this doctrine is much too complicated (*i*). Moreover, the doctrine of Imam Muhammad is followed by the author of the Sirajiyyah, and apparently by the author of the Sharifiyyah (*j*). The Fatawa Alamgiri does not express any preference either way (*k*). Since the opinion of Abu Yusuf is not followed in India, we have confined ourselves in the following sections to the doctrine of Imam Muhammad, and the difference between the two systems is pointed out in the notes. It must not, however, be supposed that the two systems differ in all respects and at all stages. So long as the intermediate ancestors do not differ in their sexes or blood, there is no difference at all between the two systems. The difference comes in only in those cases where the intermediate ancestors are—

(i) of *different sexes* as where some are males and others in the same generation are females ; or where they are

(*h*) *Abdul Serang* v. *Putee Bibi* (1902) 29 Cal. 738.
(*i*) Macnaghten, p. 9 (footnote) ; Baillie's Moohummudan Law of Inheritance, p. 92 ; Rumsey's Moohummudan Law of Inheritance, p. 65 ; Ameer Ali, Vol. II, p. 78.
(*j*) Sir. 49-50 ; Shar. 95.
(*k*) Baillie, 716, 717.

(ii) of *different blood*, as where some are of whole blood and others in the same generation are of half blood.

Abu Yusuf declines to take any notice of the sex or blood of *intermediate ancestors*, or, as they are called "roots." According to him, regard should be had to the sex and blood of the *actual claimants*, or, as they are called, "branches." The result is that according to his doctrine, the property is to be divided in the same manner as is done among son's sons and son's daughters as residuaries, that is to say, *per capita*, each male claimant taking a share double that of each female claimant.

According to Imam Muhammad, regard should be had not only to the sex and blood of the actual claimants, but also of the intermediate ancestors.

Where the intermediate ancestors differ in their *sexes*, the two systems differ as to the *shares* to be allotted to the claimants. This difference in the shares manifests itself when claimants are *descendants*, whether they be descendants of the deceased as in class I, or of brothers and sisters as in class III, or of uncles and aunts as in class IV.

Where the intermediate ancestors differ in *blood*, the two systems differ as to the *order* of succession. This difference in the order of succession manifests itself in class III when the surviving relations happen to be the descendants some of full or consanguine brothers or sisters, and some of uterine brothers or sisters. It cannot manifest itself in class I and class II, for there can be no difference of blood among the intermediate ancestors in those classes. Nor can it manifest itself in class IV, where the claimants are the descendants of uncles and aunts.

Before we proceed further, we may observe that among *Residuaries* there cannot be any difference of blood or sex among intermediate ancestors as it may be among *Distant Kindred*.

56. Rules of exclusion.—The first class of Distant Kindred comprises such of the descendants of the deceased as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following two rules in order [Sir. 47] :—

Rule (1).—The nearer in degree excludes the more remote.

Sir. 7. Thus a daughter's son or a daughter's daughter is preferred to a son's daughter's daughter. The daughter's son and the daughter's daughter are the nearest distant kindred, and they exclude all other distant kindred.

Rule (2).—Among claimants in the same degree of relationship, the children of Sharers and Residuaries are preferred to those of Distant Kindred.

Sir. 47. Thus a son's daughter's son, being a child of a sharer (son's daughter) succeeds in preference to a daughter's daughter's son, who is the child of a distant kinswoman (daughter's daughter).

57. Order of succession.—The rules set forth in section 56 lead to the following order of succession among Distant Kindred of the first class :—

(1) Daughters' children.
(2) Sons' daughters' children.
(3) Daughters' grandchildren.
(4) Sons' sons' daughters' children.
(5) Daughters' great-grandchildren and sons' daughters' grandchildren.
(6) *Other descendants of the deceased in like order.*

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Note that No. (1) belongs to the second generation, Nos. (2) and (3) to the third generation, and Nos. (4) and (5) to the fourth generation. No. (2) excludes No. (3) by reason of s. 56, rule (2). For the same reason No. (4) excludes No. (5).

58. Allotment of shares.—After ascertaining which of the descendants of the deceased are entitled to succeed, the next step is to distribute the estate among them. The distribution in this class is governed by the following rules :—

Rule (1).—If the intermediate ancestors *do not differ* in their sexes, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male [Sir. 47].

Illustrations.

(a)	Daughter's son	. 2/3	
	Daughter's daughter ..	.. 1/3	
(b)	Daughter's son's son	.. 2/3	
	Daughter's son's daughter	.. 1/3	
(c)	2 sons of daughter *A* ..	.. 4/5	(each taking 2/5)
	1 daughter of daughter *B*	.. 1/5	

Note.—To divide the estate *per stirpes* is to assign 1/2 to the two sons, and 1/2 to the daughter, that being the portion of their respective parents, *A* and *B*.

(d)	2 sons of a daughter's daughter *A*	.. 4/6 (each 2/6 or 1/3)
	2 daughters of a daughter's daughter *B*	.. 2/6 (each 1/6)

Note.—To divide the estate *per stirpes* is to assign 1/2 to the two sons and 1/2 to the two daughters.

Doctrine of Abu Yusuf.—The distribution will be the same according also to Abu Yusuf. In each of the above cases it will be seen that the sexes of the intermediate ancestors are the same. But if the claimants be a daughter's *daughter's* son and a daughter's *son's* daughter, the case is one in which the intermediate ancestors differ in their sexes. In such a case also, according to Abu Yusuf, the rule to be followed is Rule (1), so that the former, being a male, will take 2/3 and the latter, being a female, will take 1/3; the reason being that according to Abu Yusuf regard is to be had solely to the sexes of the *claimants* [see "Preliminary note," p. 53]. According to Imam

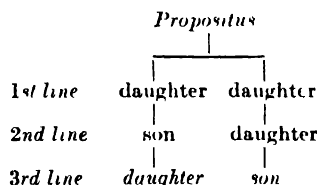
Muhammad, regard should be had also to the sexes of the *intermediate ancestors*, and the distribution is to be made according to Rule (2) below, which, it will be seen, is a distribution *per stirpes*, though not entirely such as in the Shiah law

Rule (2).—If the intermediate ancestors *differ* in their sexes, the estate is to be distributed according to the following rules [Sir. 48-50] :—

(a) The simplest case is where there are only two claimants, the one claiming through one line of ancestors, and the other claiming through another line. In such a case, the rule is to stop at the first line of descent in which the sexes of the intermediate ancestors differ, and to assign to the male ancestor a portion double that of the female ancestor. The share of the male ancestor will descend to the claimant who claims through him, and the share of the female ancestor will descend to the claimant who claims through her, irrespective of the sexes of the claimants.

Illustration

A Mahomedan dies leaving a daughter's son's daughter and a daughter's daughter's son, as shown in the following table



In this case, the ancestors first differ in their sexes in the second line of descent, and it is at this point that the rule of a double portion to the male is to be applied This is done by assigning 2/3 to the daughter's son and 1/3 to the daughter's daughter The 2/3 of the daughter's son will go to his daughter, and the 1/3 of the daughter's daughter will go to her son Thus we have

daughter's son's daughter	2/3
daughter's daughter's son ..	1/3

According to Abu Yusuf, the shares will be 1/3 and 2/3 respectively.

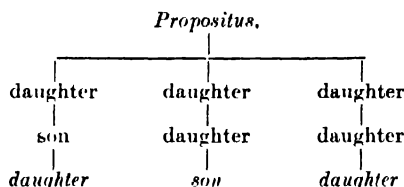
Note—Where the deceased leaves descendants in the *fourth or remoter* generation, the rule of the double share to the male is to be applied in *every successive line* in which the intermediate ancestors differ in their sexes See ill (b) to sub rule (c) below

(b) The next case is where there are three or more claimants, each claiming through a different line of ancestors. Here again, the rule is to stop at the first line in which the sexes of the intermediate ancestors differ, and to assign to each

male ancestor a portion double that of each female ancestor. But in this case the individual share of each ancestor does not descend to his or her descendants as in the preceding case, but the collective share of all the male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants, according to the rule, as between claimants in the same group, of a double portion to the male.

Illustrations.

(a) A Mahomedan dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table :



In this case, the ancestors differ in their sex in the second line of descent. In that line we have one male and two females. The rule of the double share to the male is to be applied, first, in this line of descent, so that we have

daughter's son ..	..	1/2	
daughter's daughter	..	1/4	1/2 (collective share of female ancestors)
daughter's daughter	.	1/4	

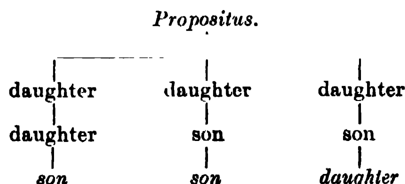
The daughter's son stands alone, and therefore his share descends to his daughter. The two female ancestors, namely, the daughters' daughters, form a group, and their collective share is 1/2, which will be divided between their descendants, that is, the daughter's daughter's son and daughter's daughter's daughter, in the proportion again of two to one, the former taking $2/3 \times 1/2 = 1/3$, and the latter $1/3 \times 1/2 = 1/6$. Thus we have

daughter's son's daughter	..	1/2=3/6
daughter's daughter's son	..	1/3=2/6
daughter's daughter's daughter	..	1/6=1/6

According to Abu Yusuf, the shares will be 1/4, 1/2 and 1/4 respectively.

(b) A Mahomedan dies leaving a daughter's daughter's son, a daughter's son's son and a daughter's son's daughter, as shown in the following table :

Propositus.



[In the preceding illustration we had one male and two females in the first line in which the sexes differed. In the present case, we have one female and two males in that line.]

First ascertain what is the line of descent in which the sexes first differ. That line is the second line of descent.

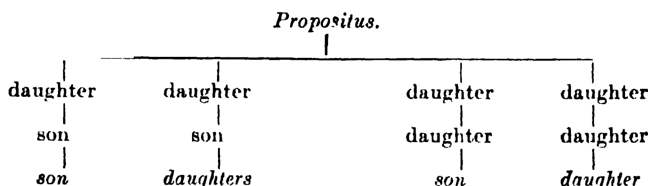
Next, assume the relations in that line to be so many children of the deceased and determine their shares upon that footing. The shares therefore will be, daughter's daughter 1/5, and each daughter's son 2/5, the collective share of the two daughter's sons being 4/5. Assign the 1/5 of daughter's daughter to her son.

Lastly, divide the 4/5 of the two male ancestors between their descendants as if they were children of one ancestor, assigning a double portion to the male descendant. Thus, the daughter's son's son takes $2/3 \times 4/5 = 8/15$, and the daughter's son's daughter $1/3 \times 4/5 = 4/15$. Thus we have

daughter's daughter's son ..	1/5=3/15
daughter's son's son .. .	8/15
daughter's son's daughter ..	4/15

According to Abu Yusuf, the shares will be 2/5, 2/5, and 1/5 respectively.

(c) A Mahomedan dies leaving a daughter's son's son, a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table :—



Here the ancestors first differ in their sexes in the second line, and in that line we have two males and two females. The collective share of the two males is 4/6, and that of the two females is 2/6. The 4/6 of the daughters' sons will be divided between the daughter's son's son and the daughter's son's daughter, the former taking $2/3 \times 4/6 = 8/18$, and the latter $1/3 \times 4/6 = 4/18$. The 2/6 of the daughters' daughters will be divided between the daughter's daughter's son and the daughter's daughter's daughter, the former taking $2/3 \times 2/6 = 4/18$, and the latter $1/3 \times 2/6 = 2/18$. Thus we have

daughter's son's son	8/18
daughter's son's daughter	4/18
daughter's daughter's son	4/18
daughter's daughter's daughter	2/18

According to Abu Yusuf the shares will be 2/6, 1/6, 2/6 and 1/6 respectively.

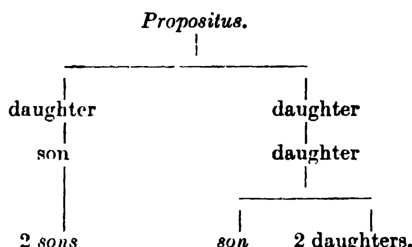
Note.—When a person dies leaving descendants in the *fourth or remoter* generation, "the course indicated in the [above rule] as to the first line in which the sexes differ is to be followed equally in any lower line ; but the descendants of any individual or group once separated must be kept separate throughout, in other words they must not be united in a group with those of any other individual or group" (*l*). See ill. (b) to sub-rule (c).

(*l*) Ramsey's Moohummudan Law of Inheritance, pp. 68-69.

(c) The last case is when there are two or more claimants claiming through the same intermediate ancestor. In such a case, there is this further rule to be applied, namely, to count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants.

Illustrations.

(a) A Mahomedan dies leaving 5 great-grand children as shown in the following diagram :—



Here the ancestors first differ in their sex in the second line, and in that line we have one male and one female. The daughter's son will count as *two males* by reason of his having two descendants among the claimants, and the daughter's daughter will count as *three females* by reason of her having three descendants. Thus we have

daughter's son	4/7
daughter's daughter	3/7

The 4/7 of the daughter's son will go to his two sons. The 3/7 of the daughter's daughter will go to her descendants, the son taking 2/4×3/7=6/28 and each daughter taking 1/4×3/7=3/28. Thus we have

daughter's son's sons	4/7=16/28 (each 8/28)
daughter's daughter's son	6/28
daughter's daughter's daughters	6/28 (each 3/28)

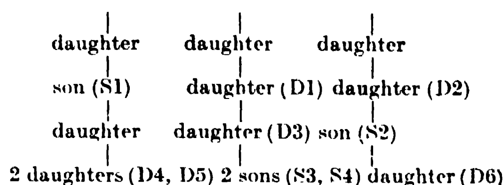
According to Abu Yusuf, the shares will be as follows :—

each daughter's son's *son*..	2/8
daughter's daughter's *son*	2/8
each daughter's daughter's *daughter*	1/8

Note.—When the deceased leaves descendants in the *fourth or remoter* generation, the process indicated in the above rule is to be applied as often as there may be occasion to group the sexes. See the next illustration.

(b) *Note.*—The following case taken from the Sirajiyyah illustrates the combined operation of sub-rules (a), (b) and (c), when the claimants belong to the *fourth* generation. See notes at the end of sub-rule (a) and sub-rule (b), and the note at the end of ill. (a) above.

A Mahomedan dies leaving 5 descendants in the fourth generation as shown in the following diagram [Sir. 49] :—



Here the sexes first differ in the second line. S1 having two descendants among the claimants will count as two males or four females. D1 having two such descendants will count as two females. D2 having one such descendant only will count as one female. The estate will therefore be divided into 7 parts as follows :—

$S1 = 4/7$;
$D1 = 2/7$ }
$D2 = 1/7$ } 3/7 (collective share of female ancestors)

S1 being by himself, his share 4/7 will pass to his two descendants D4 and D5 in equal moieties, each taking 2/7.

The collective share 3/7 of D1 and D2 will descend to their *immediate* descendants D3 and S2; and here D3 having two descendants among the claimants will count as two females, and S2 having one such descendant only will count as one male, or two females. Hence the collective share 3/7 will be divided into 4 parts as follows :—

$$D3 = 2/4 \times 3/7 = 3/14;$$
$$S2 = 2/4 \times 3/7 = 3/14$$

The share of D3 will pass to her two descendants S3 and S4, each taking 3/28. The share of S2 will pass to his descendant D6. The ultimate shares will therefore be

$D4 = 2/7$; $D5 = 2/7$; $S3 = 3/28$; $S4 = 3/28$; $D6 = 3/14$.

According to Abu Yusuf, the shares will be as follows :—

$D4 = 1/7$; $D5 = 1/7$; $S3 = 2/7$; $S4 = 2/7$; and $D6 = 1/7$.

Class II of Distant Kindred.

59. Order of succession.—(*1*) If there be no distant kindred of the first class, the whole estate will devolve upon the mother's father as being the nearest relation among Distant Kindred of the second class [see rule (1) below].

(*2*) If there be no mother's father, the estate will devolve upon such of the false ancestors in the third degree as are connected with the deceased through sharers, namely, the father's mother's father and the mother's mother's father, and

of these two, the former, as belonging to the paternal side, will take 2/3, and the latter, as belonging to the maternal side, will take 1/3 [see rules (2) and (3) below].

Note that the father's mother and the mother's mother are sharers.

(3) If there be none of these, the estate will devolve upon the remaining false ancestors in the third degree, namely, the mother's father's father and the mother's father's mother. And as these two belong to the same (maternal) side, and as the sexes also of the intermediate ancestors are the same, the former, being a male, will take 2/3, and the latter, being a female, will take 1/3 according to sec. 58, rule (1) [Sir. 51-52].

Note that the two ancestors mentioned in sub-sec. (3) are both related to the deceased through a distant kinsman, namely, mother's father.

Rules of succession.—Succession among Distant Kindred of the second class is governed by the following rules:—

Rule (1).—The nearer in degree excludes the more remote.

Rule (2).—Among claimants in the same degree, those connected with the deceased through sharers are preferred to those connected through distant kindred.

Rule (3).—If there are claimants on the paternal side as well as claimants on the maternal side, assign 2/3 to the paternal side, and 1/3 to the maternal side. Then divide the portion assigned to the paternal side among the ancestors of the father, and the portion assigned to the maternal side among the ancestors of the mother, in each case according to the rules contained in sec. 58.

Doctrine of Abu Yusuf.—It is not clear whether when the sexes of the intermediate ancestors differ, there is the same difference of opinion between the two disciples as there is in class I. Any how, no such difference can arise until ancestors in the fourth degree are reached.

Class III of Distant Kindred.

60. Rules of exclusion.—If there be no Distant Kindred of the first or second class, the estate devolves upon Distant Kindred of the third class. This class comprises such of the descendants of brothers and sisters as are neither sharers nor residuaries. The order of succession in this class is to be determined by applying the following three rules in order [Sir. 52-54]:—

Rule (1).—The nearer degree excludes the more remote.

Thus the children of brothers and sisters exclude the grandchildren of brothers and sisters.

Rule (2).—Among claimants in the same degree of relationship, the children of Residuaries are preferred to those of Distant Kindred.

Thus a full brother's son's daughter, being the child of a residuary (full brother's son), is preferred to a full sister's daughter's son who is the child of a distant kinswoman (full sister's daughter). For the same reason, a consanguine brother's son's daughter is preferred to a full sister's daughter's son, though the former is of half blood and the latter of whole blood.

Rule (3).—Among claimants in the same degree of relationship, and not excluded by reason of Rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters.

But the descendants of full sisters do not exclude the descendants of consanguine brothers or sisters, and the latter take the residue, if there be any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters.

The descendants of uterine brothers and sisters are not excluded by descendants either of full or consanguine brothers or sisters, but they inherit with them.

Note particularly that the *test of blood* laid down in Rule (3) is not to be applied until after you have applied the test laid down in Rule (2). Among descendants of uncles and aunts these tests are to be applied in the reverse order : see notes to s. 63 under the head "Rules of succession among descendants" [rules (3) and (4)].

61. Order of succession.—The above rules lead to the following order of succession among Distant Kindred of the third class :—

(1) Full brothers' daughters, full sisters' children, and children of uterine brothers and sisters.

(2) Full sisters' children, children of uterine brothers and sisters, consanguine brothers' daughters and consanguine sisters' children, the consanguine group taking the residue (if any).

(3) Consanguine brothers' daughters, consanguine sisters' children, and children of uterine brothers and sisters.

(4) Full brothers' sons' daughters (children, of Residuaries).

(5) Consanguine brothers' sons' daughters (children of Residuaries).

(6) Full brothers' daughters' children full sisters' grandchildren, and grandchildren of uterine brothers and sisters.

(7) Full sisters' grandchildren, grandchildren of uterine brothers and sisters, consanguine brothers' daughters' children and consanguine sisters' grandchildren, the consanguine group taking the residue (if any).

(8) Consanguine brothers' daughters' children, consanguine sisters' grandchildren, and grandchildren of uterine brothers and sisters.

(9) *Remoter descendants of brothers and sisters in like order.*

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Among the descendants mentioned above, Nos. (1) to (3) are nephews and nieces, and Nos. (4) to (8) are grandnephews and grandnieces. Note particularly that a full brother's son and a consanguine brother's son are residuaries; hence it is that they do not find any place in the above list.

Doctrine of Abu Yusuf.—According to Abu Yusuf also, there are three rules of exclusion, of which the first two are the same as those laid down in the preceding section. The third rule of Abu Yusuf, which also is to be applied after applying the first two rules, is that descendants of full brothers and sisters exclude those of consanguine brothers and sisters, and the descendants of consanguine brothers and sisters exclude the descendants of uterine brothers and sisters. This difference arises from the fact that Abu Yusuf would have regard to the "blood" of the *claimants* while Imam Muhammad looks to the "blood" of the *Roots*. The result is that the order of succession according to Abu Yusuf is different from that according to Imam Muhammad.

62. Allotment of shares.—After ascertaining which of the descendants of brothers and sisters are entitled to succeed, the next step is to distribute the estate among them, and this is to be done by applying the following rules in order [Sir. 53-54]:—

Rule (1).—First, divide the estate among the *Roots*, that is to say, among the brothers and sisters (as if they were living) and in so doing treat each brother who has two or more claimants descended from him as so many brothers, and each sister who has two or more claimants descended from her as so many sisters. If there is a residue left after assigning their shares to the *Roots*, but there are no Residuaries among the *Roots* [that is, neither a full nor consanguine brother], apply the doctrine of Return as described in section 53. The hypothetical claimants being brothers and sisters, no case of Increase is possible at all [s. 51].

The relations constituting Distant Kindred of the third class are descendants of brothers and sisters, full consanguine and uterine. The brothers and sisters are therefore the *Roots*. Of these, uterine brothers and sisters always inherit as sharers, one taking 1/6, and two or more 1/3. Full and consanguine brothers always inherit as

residuaries. Full sisters inherit as sharers, if there are no full brothers, one taking 1/2, and two or more 2/3; but if there are full brothers, full sisters inherit as residuaries with them. The same remarks apply to consanguine sisters. See Tab. of Sh., nos. 9 to 12; Tab. of Res., nos. 5-7.

If the claimants be a uterine brother and a full brother the former takes 1/6, and the latter the residue 5/6. But if the claimants be two or more descendants of a uterine brother, and two or more descendants of a full brother, the hypothetical share of the uterine brother will be 1/3, that being the share of two or more uterine brothers, and the hypothetical share of the full brother will be the residue 2/3.

If the claimants be a uterine sister and a full sister, the former will take 1/6, and the latter 1/2, and the residue 1/3 will go to them by Return, the former taking 1/4 and the latter 3/4. But if the claimants be 5 descendants of a uterine sister, and 9 descendants of a full sister, the hypothetical share of the uterine sister will be 1/3, that being the share of two or more uterine sisters, and that of the full sister will be 2/3, that being the share of two or more full sisters [see ill. (b) to Rule (3) below].

If the claimants be a full brother and a full sister, they will inherit as residuaries, the former taking 2/3, and the latter 1/3. But if the claimants be 3 descendants of a full brother, and 4 descendants of a full sister, the full brother will count as three males, that is, 6 females, and the full sister will count as 4 females. The property will then be divided into 10 parts, the hypothetical share of the full brother being 6/10, and that of the full sister 4/10 [compare ill. (a) to Rule (3) below]. The position of a consanguine brother and a consanguine sister is similar to that of a full brother and a full sister [compare ill. (e) to Rule (3) below].

As to the application of the doctrine of Return to the *Roots*, see ill. (d) to rule (3) below.

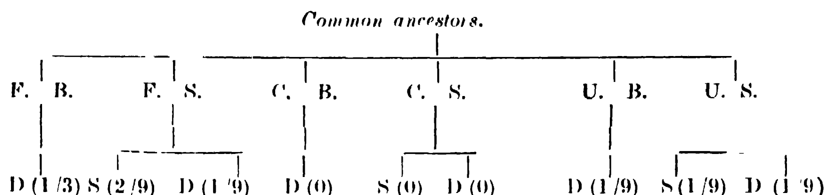
Rule (2).—After determining the hypothetical shares of the *Roots*, the next step is to assign its share to the uterine group. If there be only one claimant in that group, assign 1/6 to him, that being the hypothetical share of his parent. But if there be two or more claimants in that group, whether descended from a single uterine brother, or a single uterine sister, or two or more uterine brothers or sisters, assign 1/3 to them, that being the hypothetical share of their parent or parents, and divide it *equally* among them without distinction of sex.

Rule (3).—Lastly, divide the hypothetical shares of the full and consanguine brothers and sisters among their respective descendants as among Distant Kindred of the first class [see sec. 58].

Doctrine of Abu Yusuf.—According to Abu Yusuf, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male.

Illustrations.

(a) A Sunni Mahomedan dies leaving a daughter of a full brother, a son and a daughter of a full sister, a daughter of a consanguine brother, a son and a daughter of a consanguine sister, a daughter of a uterine brother, and a son and a daughter of a uterine sister, as shown in the following diagram :—



The children of the consanguine brother and sister are excluded from inheritance as there is a full brother's daughter [see s. 60, rule (3)]. The estate has therefore to be divided among the children of the full and uterine brothers and sisters.

As there are three claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided among their three descendants equally without distinction of sex, each taking 1/9.

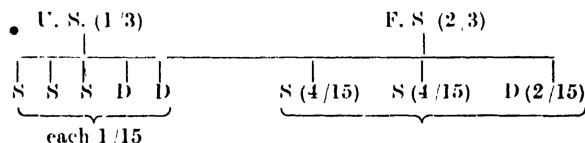
This leaves a residue 2/3, and this is to be divided in the first instance between the full brother and the full sister as residuaries, according to the number of claimants descended from each of them. The full brother, having only one descendant, counts as one male or two females. The full sister, having two descendants, counts as two females. The residue will therefore be divided into four parts, the full brother taking 2/4 × 2/3 = 1/3, and the full sister also 2/4 × 2/3 = 1/3.

The full brother's share 1/3 will go to his descendant. The full sister's share 1/3 will be divided between her two children according to the rule of the double share to the male as in class I of Distant Kindred, the son taking 2/3 × 1/3 = 2/9, and the daughter taking 1/3 × 1/3 = 1/9.

Note. On failure of children of full brother and sister, the residue will be divided in like manner among the children of consanguine brother and sister.

(According to Abu Yusuf, the whole estate will be divided among the children of the *full* brother and sister according to the rule of the double share to the male, so that the full brother's daughter will take 1/4, the full sister's son 1/2, and her daughter 1/4. On failure of children of the full brother and sister, the estate will be divided in like manner among the children of *consanguine* brother and sister. And on failure of them, it will be distributed in like manner among the children of the *uterine* brother and sister).

(b) A Sunni Mahomedan dies leaving five children of a uterine sister, and three children of a full sister, as shown in the following diagram :—

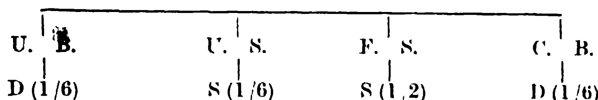


As there are five claimants in the uterine group, the share of the uterine sister is 1/3, and this will be divided among her five children equally without distinction of sex, each taking 1/5×1/3 = 1/15.

The full sister, having three descendants, will count as three sisters, and she will take 2/3, that being the share of two or more full sisters [see Tab. of Sh. No. 11]. This will then be divided among her three children according to the rule of the double share to the male as among Distant Kindred of the first class, so that each son will take $2/5 \times 2/3 = 4/15$, and the daughter will take $1/5 \times 2/3 = 2/15$.

[According to Abu Yusuf, the whole estate will be divided among the children of the *full* sister according to the rule of the double share to the male, so that each son will take 2/5, and the daughter will take 1/5.]

(c) A Sunni Mahomedan dies leaving a uterine brother's daughter, a uterine sister's son, a full sister's son, and a consanguine brother's daughter, as shown in the following diagram :—



Here there is no descendant of a full brother; therefore the consanguine brother's daughter is not excluded from inheritance, and she will take what remains after the estate is divided among the other claimants.

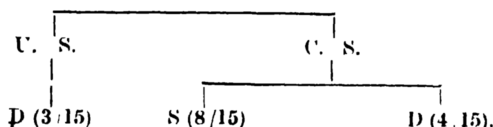
As there are two descendants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided equally between their children without distinction of sex, each taking 1/6.

The full sister, having only one descendant, counts as one full sister, and her share therefore is 1/2. This will descend to her son.

This leaves a residue of 1/6 which will go to the consanguine brother as a residuary. This will descend to his daughter.

[According to Abu Yusuf, the whole estate will go to the *full* sister's son.]

(d) A Sunni Mahomedan dies leaving a uterine sister's daughter, and a son and a daughter of a consanguine sister, as shown in the following diagram :—



The uterine sister has only one descendant; her share therefore is 1/6. The consanguine sister, having two descendants, counts as two consanguine sisters, and her share therefore is 2/3 [Tab. of Sh. No. 12]. This leaves the residue 1/6, and since there is no residuary among the *Roots*, the residue will go to the uterine sister and consanguine sister by Return. The hypothetical shares will therefore be—

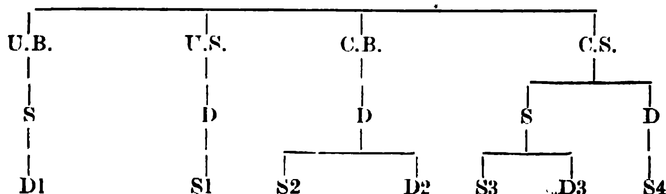
uterine sister	1/6 = 1/6	increased	to	1/5
consanguine sister	2/3 = 4/6	„	„	4/5

The uterine sister's share 1/5 will pass to her daughter.

The consanguine sister's share 4/5 will be divided between her son and daughter, the son taking 2/3×4/5=8/15, and the daughter 1/3×4/5=4/15.

[According to Abu Yusuf, the whole estate will go to the children of the *consanguine* sister, the son taking 2/3, and the daughter 1/3.]

(e) A Sunni Mahomedan dies leaving four grandnephews S1, S2, S3, and S4, and 3 grandnieces D1, D2, and D3, as shown in the following diagram :—



As there are two claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will pass to D1 and S1, each taking 1/6.

This leaves a residue 2/3, and this is to be divided in the first instance between the consanguine brother and sister as residuaries according to the number of claimants descended from each of them.

The consanguine brother, having two claimants descended from him, counts as two males or four females. The consanguine sister, having three claimants descended from her, counts as 3 females. The residue will therefore be divided into seven parts, the consanguine brother taking 4/7×2/3=8/21, and the consanguine sister taking 3/7×2/3=6/21.

The consanguine brother's share 8/21 will be divided between his two descendants S2 and D2, S2 being a male taking 2/3×8/21=16/63, and D2 being a female taking 1/3×8/21=8/63.

The consanguine sister's share 6/21 is to be divided in the first instance between her son and her daughter. The son, having two claimants descended from him, counts as two males or four females. The daughter, having only one claimant descended from her, counts as one female. The son will therefore take 4/5×6/21=8/35, and the daughter will take 1/5×6/21=2/35.

The son's share 8/35 will be divided between his two children S3 and D3 according to the rule of the double share to the male, S3 taking 2/3×8/35=16/105, and D3 taking 1/3×8/35=8/105.

The daughter's share 2/35 will pass to her son S4.

The shares will therefore be—

D1=1/6; S1=1/6; S2=16/63; D2=8/63; S3=16/105; D3=8/105; and S4=2/35. The total of these shares is unity.

[According to Abu Yusuf, the whole property will be divided among the consanguine groups to the entire exclusion of the uterines, so that S2, S3, and S4 will each take 2/8 or 1/4, and D2 and D3 will each take 1/8.]

Class IV of Distant Kindred.

63. Order of succession.—(*1*) If there are no Distant Kindred of the first, second, or third class, the estate will

devolve upon Distant Kindred of the fourth class in the order given below [Sir. 56-58] :—

(1) Paternal and maternal uncles and aunts *of the deceased*, other than his full and consanguine paternal uncles who are Residuaries.

(2) The descendants h. l. s. of all the paternal and maternal uncles and aunts of the deceased, other than sons h. l. s. of his full and consanguine paternal uncles (they being Residuaries), the nearer excluding the more remote.

(3) Paternal and maternal uncles and aunts *of the parents*, other than the full and consanguine paternal uncles of the father who are Residuaries.

(4) The descendants h. l. s. of all the paternal and maternal uncles and aunts of the parents, other than sons, h. l. s. of the full and consanguine paternal uncles of the father (they being Residuaries), the nearer excluding the more remote.

(5) Paternal and maternal uncles and aunts *of the grandparents* other than the full and consanguine paternal uncles of the father's father who are Residuaries.

(6) The descendants h. l. s. of all the paternal and maternal uncles and aunts of the grandparents, other than sons h. l. s. of the full and consanguine paternal uncles of the father's father (they being Residuaries), the nearer excluding the more remote.

(2) *Remoter uncles and aunts* and their descendants in like manner and order.

(8) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Doctrine of Abu Yusuf.—The only difference between the two disciples as regards succession of the Distant Kindred of the fourth class is as to the allotment of *shares* among the descendants. See sec. 65 below

64. Uncles and aunts.—To distribute the estate among the uncles and aunts of the deceased, proceed as follows :—

(1) *First*, assign 2/3 to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is, 2/3 of the estate, among

(a) full paternal aunts in equal shares; failing them, among

(b) consanguine paternal aunts in equal shares; and, failing them, among

(c) uterine paternal uncles and aunts, according to the rule of the double share to the male.

(3) *Lastly*, divide the portion assigned to the maternal side, that is, 1/3 of the estate, among

(a) full maternal uncles and aunts; failing them, among

(b) consanguine maternal uncles and aunts; and, failing them, among

(c) uterine maternal uncles and aunts, according to the rule, in *each* case, of the double share, to the male.

(4) If there be no uncle or aunt on the paternal side, the maternal side will take the whole. Similarly, if there be no uncle or aunt on the maternal side, the paternal side will take the whole.

Sir. 55, 56.

Note that no claimant on the paternal side excludes any claimant on the maternal side, and no claimant on the maternal side excludes any claimant on the paternal side.

Note particularly that full paternal uncles and consanguine paternal uncles are *Residuaries*. Hence we are not concerned with them here.

Doctrine of Abu Yusuf.—There is no difference between the two disciples as regards *the succession* of uncles and aunts.

Illustrations.

		Heir	Share	Remarks
(a)	2/3	*Full paternal aunt*	2/3=6/9	
		Cons. paternal aunt		(excluded by *full* paternal aunt)
	1/3	*Full maternal uncle*	2/3 × 1/3=2/9	
		Full maternal aunt	1/3 × 1/3=1/9	
		Cons. maternal uncle		(excluded by full maternal uncle and aunt)
(b)	2/3	*Cons. paternal aunt*	=2/3	
		Ut. paternal uncle		(excluded by *cons.* paternal aunt)
	1/3	*Full maternal aunt*	1/3	
(c)	2/3	*Ut. paternal uncle*	2/3 × 2/3=4/9	
		Ut. paternal aunt	1/3 × 2/3=2/9	
	1/3	*Full maternal uncle*	2/3 × 1/3=2/9	
		Full maternal aunt	1/3 × 1/3=1/9	

Note.—The result would be the same if the deceased left a *uterine* maternal uncle and aunt instead of a *full* maternal uncle and aunt.

(d)	2/3	*Ut. paternal aunt*	2/3=6/9
	1/3 {	*Cons. maternal uncle*	2/3×1/3=2/9
		Cons. maternal aunt	1/3×1/3=1/9

Rules of succession.—The present section is based upon the following rules:—

(1) If there are claimants on the paternal side, together with claimants on the maternal side, the former will take collectively 2/3, and the latter 1/3, and *each side* will then divide its own collective share according to the rule of the double share to the male.

(2) Among claimants *on the same side*, those of the full blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations.

Order of priority.—The uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The order of succession among the uncles and aunts of the deceased is explained in the Table on p. 74 below.

65. Descendants of uncles and aunts.—If there are no uncles or aunts of the deceased, the estate will devolve upon the descendants of uncles and aunts, other than sons how lowsoever of full paternal uncles and consanguine paternal uncles who are residuaries. To distribute the estate among these relations, proceed as follows [Sir. 56-58]:—

(1) *First*, assign 2/3 to the paternal side, that is, to descendants of paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to descendants of maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is, 2/3 of the estate, among—

(a) full paternal uncles' daughters; failing them, among

(b) full paternal aunts' children; failing them, among

(c) consanguine paternal uncle's daughters; failing them, among

(d) consanguine paternal aunt's children; and failing them, among

(c) children of uterine paternal uncles and aunts,

the division among the members of each of the five groups above to be made as among Distant Kindred of the first class [see sec. 58].

Note that (a) excludes (b), the reason being that (a) are children of residuaries (full paternal uncles), while (b) are children of distant kindred (full paternal aunts).

Note also that a full paternal uncle's son and a consanguine paternal uncle's son are residuaries; hence they do not find any place in the above list.

(3) *Lastly*, divide the portion assigned to the maternal side, that is, 1/3 of the estate, among—

(a) children of full maternal uncles and aunts; failing them, among

(b) children of consanguine maternal uncles and aunts; failing them, among

(c) children of uterine maternal uncles and aunts,

the division among the members of each of the three groups above to be made as among Distant Kindred of the first class [see sec. 58].

(4) If there be no children of paternal uncles and aunts, the children of maternal uncles and aunts will take the whole. Similarly, if there be no children of maternal uncles and aunts, the children of paternal uncles and aunts will take the whole.

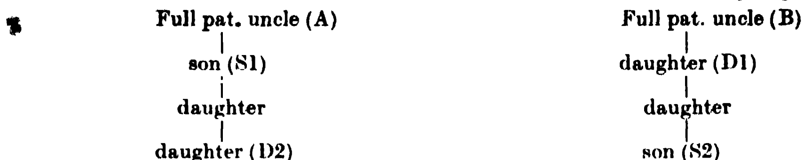
(5) If there be no children either of paternal uncles and aunts or of maternal uncles and aunts, the estate will be divided among their grandchildren on the same principle. Failing grandchildren, it will be divided among remoter descendants, the nearer degree excluding the more remote.

The order of succession on each side is based on certain rules which are set forth below immediately after the illustrations.

Doctrine of Abu Yusuf.—The only difference between the two disciples as to the succession of descendants of uncles and aunts is that, according to Abu Yusuf, the portion assigned to each side is to be divided among the claimants *per capita* according to the rule of the double share to the male.

Illustrations.

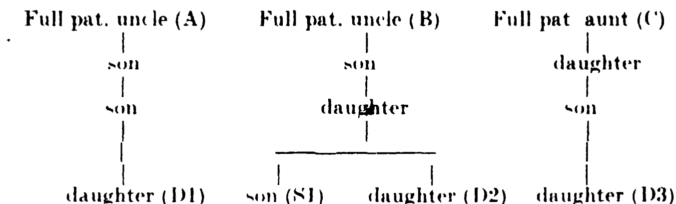
(a) The claimants are those indicated in the lowest line of the following diagram :—



Here the first line in which the sex of the ancestors differs is the second line of descent. Therefore S1 takes 2/3, and D1 takes 1/3. Therefore, the share of D2 is 2/3 and that of S2 is 1/3.

According to Abu Yusuf, D2 being a female will take 1/3, and S2 being a male will take 2/3.

(b) Suppose the surviving relatives to be as shown in the last line of the following diagram :—



Here all the descendants are *equal in degree*, and they are also the same in blood, that is, they are all descendants of uncles and aunts of the *full blood*. But D1 is a child of a residuary (full paternal uncle's son's son), while S1, D2, and D3 are children of distant kindred. Therefore D1 exleudes S1, D2, and D3, and she will take the whole estate [see below "Rules of Succession"]

Suppose now that the surviving relations are S1, D2, and D3. In that case the distribution will be as follows :-

Here the sexes differ first in the first line. As B has two claimants descended from him, he will count as two males or four females. C, having only one claimant descended from her, will count as one female. The estate will therefore be divided into five parts of which B will take 4/5, and C 1/5.

B's share 4/5 will be divided among his two descendants S1 and D2 according to the rule of the double portion to the male, so that S1 will take 2/3 × 4/5 = 8/15, and D2 will take 1/3 × 4/5 = 4/15. C's share 1/5 will descend to D3. Hence—

S 1 = 8/15 ; D 2 = 4/15 ; and D 3 = 1/5 = 3/15.

[According to Abu Yusuf, the shares will be 1/2, 1/4 and 1/4 respectively.]

Rules of succession among descendants.—To distribute the estate among descendants of uncles and aunts, apply the following rules *in the order in which they are given below* :—

Rule (1).—The nearer degree excludes the more remote.

Rule (2).—If both the paternal and maternal sides are represented, two-thirds are assigned to the paternal side and one-third to the maternal side.

Rule (3).—Among claimants *on the same side*, those of the whole blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations. [This rule applies both to the paternal and maternal sides, and it is to be applied separately to each side.]

Rule (4).—Among claimants on the paternal side, the children of residuaries are preferred to those of distant kindred. [Thus a full paternal uncle is a residuary; his daughters, therefore, would be the children of a residuary, and they would be preferred to the daughters of a full paternal aunt who is a distant kinswoman. Similarly, a consanguine paternal uncle is a residuary, his daughters therefore would be daughters of a residuary, and they would be preferred to the daughters of a consanguine paternal aunt. Again, a full paternal uncle's son is a residuary; his daughters therefore would be children of a residuary, and they would be preferred to the daughters of a full paternal uncle's daughter. Upon the same principle the daughters of a consanguine paternal uncle's son would be preferred to the daughters of consanguine paternal uncle's daughter. This rule cannot apply to relations on the maternal side, because none of the *maternal* uncles is a residuary.]

Rule (5). After ascertaining which of the relations are entitled to succeed, the portion assigned to the paternal side is to be distributed among the members of that side as among Distant Kindred of the first class [s. 58]. The portion assigned to the maternal side is also to be distributed according to the same principle [s. 58].

The whole of sec. 65 is based on the above rules.

Order of priority among descendants.—The descendants of uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The Table given on the next page shows at a glance all uncles and aunts of the deceased and their descendants up to the third generation.

66. Other Distant Kindred of the fourth class.—If there are no descendants of uncles and aunts, the estate will devolve upon other Distant Kindred of the fourth class in the order of succession given in sec. 63 above, the distribution among higher uncles and aunts being governed by the principles stated in sec. 64, and that among their descendants by those stated in sec. 65 [Sir. 58].

E.—Successors unrelated in blood.

67. Successor by contract.—In default of Sharers, Residuaries, and Distant Kindred, the inheritance devolves upon the "Successor by contract," that is, a person who derives his right of succession under a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom to which the deceased may become liable.

Sir. 13; Hedaya, p. 517. The right of inheritance by reason of *Wala* dealt with in this section is taken away by the Slavery Act, 1843.

Table of uncles and aunts of the deceased and their descendants up to the third generation.

In the following Table F stands for 'full,' C for 'consanguine,' and Ut. for 'uterine.' P stands for 'paternal' and M for 'maternal.' U stands for 'uncle' and A for 'aunt.' The small letter *s* stands for 'son,' d stands for 'daughter,' and ch. for 'children.' The italics indicate Residuaries; the rest are Distant Kindrde. Note that the maternal side is not excluded by the Paternal side, but succeeds with members of that side :—

	Paternal side—2/3					Maternal side—1/3.		
Line of Us. and As	*F. P. U.*	F. P. A. (1)	*C. P. U.*	C. P. A. (2)	Ut. P. U. & A. (3)	F. M. U. & A. (i)	C. M. U. & A. (ii)	Ut. M. U. & A. (iii)
1st gen.	*s*; d (1)	ch (2)	*s*; d (3)	ch (4)	ch (5)	ch (i)	ch (ii)	ch (iii)
2nd gen.	*s*; d (1); ch (2)	ch (2)	*s*; d (3); ch (4)	ch (4)	ch (5)	ch (i)	ch (ii)	ch (iii)
3rd gen.	*s*; d (1); ch (2); ch (2)	ch (2)	*s*; d (3); (ch) 4; ch (4)	ch (4)	ch (5)	ch (i)	ch (ii)	ch (iii)

Line of uncles and aunts.—In this line, *F. P. U.* and *C. P. U.* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown, in the case of paternal uncles and aunts, by the Arabic numerals (1), (2) and (3), and in the case of maternal uncles and aunts by the Roman figures (i), (ii) and (iii). See s. 64.

1st generation.—If there be no uncles or aunts, the estate devolves upon their children. Of these, *F.P. U. s.* and *C. P. U. s.* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown, in the case of children of paternal uncles and aunts, by the Arabic numerals (1), (2), (3), (4) and (5), and in the case of maternal uncles and aunts by the Roman figures (i), (ii) and (iii). No. (1), being the child of a residuary, is preferred to No. (2), though they are both of full blood. For the same reason, No. (3) is preferred to No. (4), though they are both consanguine relations. See s. 65.

2nd generation.—If there be no children of uncles and aunts, whether paternal or maternal, the estate devolves upon the grandchildren of uncles and aunts. Of these, *F. P. U. s. s.* and *C. P. U. s. s.* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the same manner as in the first generation. No. (1), being the child of a residuary, is preferred to the group constituted by No. (2) and No. (2), they being children of Distant Kindred, though they are all of full blood. For the same reason No. (3) is preferred to the group constituted by No. (4) and No. (4), though they are all consanguine relations. Failing No. (1), No. (2) and No. (2) inherit together. Failing No. (3), No. (4) and No. (4) inherit together. Failing these No. (5) succeeds.

3rd generation.—This does not require any further explanation. All that requires to be noted is that No. (1) excludes the group constituted by No. (2), No. (2) and No. (2), and No. (3) excludes the group constituted by No. (4), No. (4) and No. (4).

68. Acknowledged kinsman.—Next in succession is the "Acknowledged Kinsman," that is, a person of unknown descent in whose favour the deceased has made an acknowledgment of kinship, not through himself, but through another.

Such an acknowledgment confers upon the "Acknowledged Kinsman" the right of succession to the property of the deceased, subject to bequests to the extent of the bequeathable third, but it does not invest the acknowledgee with all the rights of an actual kinsman.

Sir. 13. The kinship acknowledged must be kinship *through another*, that is, through the deceased's father or his grandfather. Thus, a person may acknowledge another to be his brother, for that is kinship through the *father* (*m*). But he may not acknowledge another to be his son, for that is kinship through *himself*. The acknowledgment by the deceased of a person as his son or daughter stands upon a different footing altogether, and it is dealt with in the chapter on "Parentage."

69. Universal legatee.—The next successor is the "Universal Legatee," that is, a person to whom the deceased has left the whole of his property by will.

Sir. 13. It is to be noted that the prohibition against bequeathing more than a third exists only for the benefit of the heirs. Hence a bequest of the whole will take effect if the deceased has left no known heir (*n*).

70. Escheat.—On failure of all the heirs and successors above enumerated, the property of a deceased Mahomedan escheats to the Crown.

Sir. 13. The rule of pure Mahomedan law in this respect is different, for, according to that rule the property does not devolve upon the Government by way of inheritance as *ultimus hœres*, but falls into the *bait-ul-mal* (public treasury) *for the benefit of Musalmans.*

F.—Miscellaneous.

71. Step-children.—Step-children do not inherit from step-parents, nor do step-parents inherit from step-children.

See Macnaghten, Precedents of inheritance, No. xxi.

72. Bastard.—An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and her relations, and they inherit from such child (*o*).

(*m*) Tagore Law Lectures, 1873, pp. 92-93.
(*n*) Baillie's Mahomedan Law of Inheritance p. 19.
(*o*) Tagore Law Lectures, 1873, p. 123.

Illustration.

[A Mahomedan female of the Sunni sect dies leaving a husband and an illegitimate son of her sister. The husband will take 1/2 and the sister's son, though illegitimate will take the other 1/2 as a distant kinsman, being related to the deceased through his mother: *Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683.]

An illegitimate child does not inherit from its putative father or his relations, nor do they inherit from such child.

73. Missing persons.—When the question is whether a Mahomedan is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Under the Hanafi law, a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth. But it has been held by a Full Bench of the Allahabad High Court that this rule is only a rule of *evidence*, and not one of *succession*, and it must therefore be taken as superseded by the provisions of the Indian Evidence Act (*p*). The present section reproduces, with some verbal alterations, the provisions of s. 108 of the Evidence Act.

(*p*) *Mazhar Ali* v. *Budh Singh* (1884) 7 All. 297; *Mairaj* v. *Abul Wahid* (1921) 43 All. 673, 63 I. C. 286. See also *Moolla Cassim* v. *Moolla Abdul* (1905) 33 Cal. 173, 178, 32 I. A. 177.

CHAPTER VIII.

SHIAH LAW OF INHERITANCE.

[**Preliminary note**—The most authoritative text-book of the Shiah law is Sharaya-ul-Islam (q), the whole of which has been translated into French by M. Querry under the title *Droit Musalman*. The Second part of Baillie's Digest of Mahomedan Law, with the exception of the last book, is composed, as the author tells us in the Introduction (p. xxvi), of translations from Sharaya-ul-Islam.]

74. Division of heirs.—The Shiahs divide heirs into two groups, namely, (1) heirs by consanguinity, that is, blood relations, and (2) heirs by marriage, that is husband and wife.

75. Three classes of heirs by consanguinity.—(*1*) Heirs by consanguinity are divided into three classes, and each class is sub-divided into two sections. These classes are respectively composed as follows:—

I. (i) Parents;
   (ii) children and other lineal descendants h. l. s.

II. (i) Grandparents h. h. s. (true as well as false);
   (ii) brothers and sisters and their descendants h. l. s.

III. (i) Paternal, and (ii) maternal, uncles and aunts of the deceased, and of his parents and grandparents h. h. s., and their descendants h. l. s.

(*2*) Of these three classes of heirs, the first excludes the second from inheritance, and the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section [Baillie, Part II, 276, 280, 285].

As to the distribution of estate among the heirs, see s. 83 *et seq.*

(b) A maternal grandfather counts as a uterine brother, and a maternal grandmother counts as a uterine sister.

(q) *Aga Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All, 429, 450.

Illustrations.

[(a) A Shiah Mahomedan dies leaving a daughter's son, a father's mother, and a full brother.

By Hanafi law the father's mother as a sharer will take 1/6, and the full brother as a residuary will take 5/6; the daughter's son, being a distant kinsman, will be entirely excluded from inheritance.

By Shiah law the daughter's son, being an heir of the first class, will succeed to the whole inheritance in preference to the father's mother and the full brother, both of whom belong to the second class of heirs.

(b) A Shiah Mahomedan dies leaving a brother's daughter and a full paternal uncle.

By Hanafi law the full paternal uncle, being a residuary, will take the whole property to the exclusion of the brother's daughter who is a distant kinswoman.

By Shiah law the brother's daughter, being an heir of the second class, will succeed in preference to the full paternal uncle who belongs to the third class of heirs.

(c) A Shiah Mahomedan dies leaving a full paternal uncle's son and a mother's father.

By Hanafi law the full paternal uncle's son, being a residuary, will succeed to the whole estate to the entire exclusion of the mother's father who is a distant kinsman.

By Shiah law the mother's father, being an heir of the second class, will succeed in preference to the full paternal uncle's son who belongs to the third class of heirs.

(d) A Shiah Mahomedan dies leaving (1) a father, (2) a mother, (3) a daughter, (4) a son's son, (5) a brother, and (6) a paternal uncle. Which of these relations are entitled to succeed?

Here the first four relations belong to the first class of heirs, the fifth belongs to the second class, and the sixth belongs to the third class. The fifth and sixth are therefore excluded from inheritance. The father and mother belong to the first section of Class I, and they are both equal in degree. The daughter and son's son belong to the second section, and of these two the daughter, being nearer in degree, excludes the son's son. The only persons therefore entitled to inherit are the father, the mother, and the daughter.

(e) The surviving relations are (1) a grandfather, (2) a grandmother, (3) a great-grandfather, (4) a brother, and (5) a brother's son. Here all the relations belong to second class of heirs, the first three belonging to the first section of that class, and the last two to the second section. The grandfather and grandmother exclude the great-grandfather by reason of the rule that the nearer in each section excludes the more remote. For the same reason the brother excludes the brother's son. The only persons therefore entitled to inherit are the grandfather, the grandmother and the brother.]

Note that parents do not exclude children, but inherit with them. If there be no children, parents inherit with grandchildren. Similarly, in the second class, brothers and sisters do not exclude grandparents, but inherit with them. If there be no brothers or sisters, the grandparents inherit with the children of brothers and sisters. In the same way in the third class paternal uncles and aunts do not exclude maternal uncles and aunts, but inherit with them.

The above illustrations exemplify the fundamental distinction between the Sunni and the Shiah Law of Inheritance. Under the Sunni law, distant kindred are postponed to sharers and residuaries (s. 54); under the Shiah law, they inherit with them. The Sunnis prefer agnates to cognates; the Shiahs prefer the nearest kinsman, whether they be agnates or cognates. In fact, the Shiah law does not recognize any separate class of heirs corresponding to the "distant kindred" of Sunni law. All heirs under the Shiah law are either sharers or residuaries (s. 77).

76. Husband and wife.—The husband or wife is never excluded from succession, but inherits together with the nearest heirs by consanguinity, the husband taking 1/4 or 1/2, and the wife taking 1/8 or 1/4 under the conditions mentioned in the Table of Sharers on page 81 below.

As to the disability of a childless widow to succeed to her husband's immoveable property, see s. 99 below.

77. Table of Sharers—Shiah Law.—(*1*) For the purpose of determining the shares of heirs, the Shiahs divide heirs into two classes, namely, Sharers and Residuaries. There is no separate class of heirs corresponding to the "Distant Kindred" of Sunni law.

(*2*) The Sharers are nine in number. The Table on page 81 gives a list of Sharers together with the shares assigned to them in Shiah law.

(*3*) The descendants h. l. s. of Sharers are also Sharers.

Of the nine sharers mentioned in the Table, the first two are heirs by affinity. The next three belong to the first class of heirs by consanguinity (s. 75), and the remaining four belong to the second class. There are no sharers in the third class of heirs.

Note that the true grandfather h. h. s., the true grandmother h. h. s., and the son's daughter h. l. s., who are sharers according to Sunni law, are not sharers, but residuaries, according to Shiah law.

It is very important to note that the descendants of sharers are also sharers. This refers, of course, to the descendants of the (1) daughter, (2) uterine brother, (3) uterine sister, (4) full sister, and (5) consanguine sister. It does not refer to the descendants, if they can be called descendants at all, of the husband, wife, father or mother. The Shiah jurists are not concerned with the descendants of these four relations.

78. Residuaries.—(*1*) All heirs other than Sharers are Residuaries.

(*2*) The descendants h. l. s. of Residuaries are also Residuaries.

Thus sons, brothers, uncles and aunts, are all residuaries. Their descendants, therefore, are also residuaries. For example, a son's daughter, being a descendant of a residuary (son), is also a residuary.

Of the nine sharers mentioned in the Table of Sharers, there are four who inherit sometimes as sharers, and sometimes as residuaries These are the (1) father, (2) daughter, (3) full sister, and (4) consanguine sister. As to the last three it is to be observed that where any one of them would have, if living, inherited as a sharer, her descendants would inherit as sharers, and if she would have inherited as a residuary, her descendants would inherit as residuaries (sec. 82).

79. Distribution of property.– (*1*) If the deceased left only one heir, the whole property would devolve upon that heir, except in the case of a wife. If the only heir be a wife, she is entitled to no more than her Koranic share (one-fourth) and the residue (three-fourths) escheats to the Crown.

Baillie, Part II, 262. The reason of the exception in the case of a wife is that she is not entitled to the surplus by *Return*, not even if there be no other heir If she is the sole heir, she takes 1/4, and the surplus passes to the Imam, now the Crown Mr Ameer Ali is of opinion that there being no machinery now to take charge of the Imam's share, the surplus should pass to the wife [Ameer Ali Vol II, p 148, f n (3)]

If the only heir be a sharer, *e g*, a husband, he takes his Koranic share (one half) as a sharer, and the residue by Return If the only heir be a residuary, *e g*, a brother he takes the whole estate as a residuary As to Sunni law see s 53

(2) If the deceased left two or more heirs, the first step in the distribution of the estate is to assign his or her share to the husband or wife. The next step is to ascertain which of the surviving relations are entitled to succeed, and this is to be done with the help of the rules laid down in sec. 75. The estate (*minus* the share of the husband or wife, if any) is then to be divided among those entitled to succeed according to the rules of distribution applicable to the class to which they belong [ss. 83-97].

Note that the husband or wife, as the case may be, is always entitled to succeed, whatever be the class to which the other claimants belong The husband and wife always inherit as sharers, their shares being respectively 1/4 and 1/8 when there is a lineal descendant, and 1/2 and 1/4 when there is no lineal descendant. Since there are no lineal descendants either in the second or third class of heirs, it follows that when the husband or wife succeeds with the heirs of the second or third class, he or she takes his or her full share, that is, the husband takes 1/2, and the wife takes 1/4

80. Principle of representation.--The cardinal principle underlying the rules of the Shiah law of inheritance is the principle of representation. According to that principle the descendants of a deceased son represent the son, and take the

TABLE OF SHARERS—SHIAH LAW [Sec. 77.]

(*Baillie, Part II*, 271-276, 381.)

Sharers.	Normal share		Conditions under which the share is inherited.	Share as varied by special circumstances.
	of one	of two or more collectively		
1. Husband ..	1/4	..	When there is a lineal descendant	1/2 when no such descendant.
2. Wife ..	1/8	1/8	When there is a lineal descendant	1/4 when no such descendant
3. Father (r)	1/6	..	When there is a lineal descendant	[If there be no lineal descendant, the father inherits as a residuary.]
4. Mother ..	1/6	..	(a) When there is a lineal descendant, or (b) when there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father	1/3 in other cases
5. Daughter ..	1/2	2/3	When no son	[With the son she takes as a residuary.]
6. 7. Uterine brother or sister	1/6	1/3	When no parent, or lineal descendant [see s. 75]	
8. Full sister.	1/2	2/3	When no parent, or lineal descendant, or full brother, or father's father [see ss. 75, 88]	[The full sister takes as a residuary with the full brother and also with the father's father: see s. 88.]
9. Consanguine sister.	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father [see ss. 75, 88].	[The consanguine sister takes as a residuary with the consanguine brother and also with the father's father: see s. 88.]

Note.—The descendants h. l. s. of sharers are also sharers [s. 77.]

(r) As to the father's *extra* rights as Sharer, see ss. 95 and 97.

portion which he, if living, would have taken. Similarly, the descendants of a deceased daughter represent the daughter, and take the portion which she, if living, would have taken. The same is the case with the descendants of a deceased brother, a deceased sister, a deceased uncle, and a deceased aunt (s).

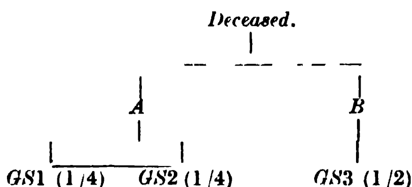
The principle of representation is not confined in its operation to descendants only. It applies in the ascending as well as in the descending line. Thus great-grandparents take the portion which the grandparents, if living, would have taken; and the father's uncles and aunts take the portion which the deceased's uncles and aunts, if living, would have taken.

The application of this principle is shown in ss. 83, 85, 87, 88, 91 and 92.

First paragraph.—This does not mean that grandsons by a predeceased son inherit with sons or that granddaughters by a predeceased daughter inherit with daughters. Grandchildren succeed only in default of children: see s. 83 below.

81. Stirpital succession.—Succession among descendants in each of the three classes of heirs (s. 75) is *per stirpes*, and not *per capita* (t).

This is repeating in other words the principle of representation described in the last section. Thus suppose a Shiah dies leaving two grandsons *GS*1 and *GS*2 by a predeceased son *A* and a grandson *GS*3 by another predeceased son *B*, as shown in the following diagram:—



By Shiah law the estate is to be notionally divided first among the two sons *A* and *B*, so that each takes 1/2. *A*'s share 1/2 descends to his two sons *GS*1 and *GS*2, each taking 1/4. *B*'s share 1/2 passes to his son *GS*3. The division, in other words, is according to the *stocks*, and not according to the *claimants*. By Sunni law *GS*1, *GS*2 and *GS*3 take *per capita*, that is, each takes 1/3 without reference to the shares which their respective fathers, if living, would have taken. Under the Shiah law *A*'s two sons *represent A* and stand in his place, and *B*'s son *represents B* and stands in his place. Under the Sunni law there is no such representation (s. 42).

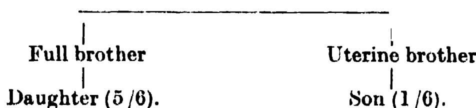
The above is an example of succession *per stirpes* among the descendants of sons. The descendants of daughters, brothers, sisters, uncles, aunts granduncles and grandaunts also succeed *per stirpes*: see ss. 83, 87, 91 and 92.

(s) *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540, 547, 548, 558.

(t) *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540.

82. Succession among descendants.—The descendants of a person who, if living, would have taken as a Sharer, succeed as Sharers. The descendants of a person who, if living, would have taken as a Residuary, succeed as Residuaries.

This follows necessarily from the principle of representation described in s. 80. Thus suppose a Shiah dies leaving a full brother's daughter and a uterine brother's son as shown in the following diagram :—



The uterine brother, had he survived, would have taken as a sharer his Koranic share 1/6 [see Table of Sh., No. 6]. The full brother, had he survived, would have taken 5/6 as a residuary. The uterine brother's son, being the descendant of a sharer, will succeed as a sharer, and *representing* as he does his father, take his father's share 1/6. The full brother's daughter, being the descendant of a residuary, will succeed also as a residuary, and *representing* as she does her father, take her father's portion 5/6. Under the Sunni law, both a full brother's daughter and a uterine brother's son are distant kindred of the third class. According to Muhammad, the former would take 5/6, and the latter 1/6 exactly as in Shiah law [see s. 62]. According to Abu Yusuf, the former entirely excludes the latter [see notes to s. 61, " Doctrine of Abu Yusuf "].

Having described the mode of distribution in s 79, and having explained the principle of representation in s. 80, and its two corollaries in ss. 81 and 82, we proceed to enumerate the special rules by which succession in each of the three classes of heirs mentioned in s. 75 is governed.

Distribution among Heirs of the First Class.

83. Rules of succession among heirs of the first class.— The persons who are first entitled to succeed to the estate of a deceased Shiah Mahomedan are the heirs of the first class *along with* the husband or wife, if any [s. 79 (2)]. The first class of heirs comprises parents, children, grandchildren, and remoter lineal descendants of the deceased. The parents inherit together with children, and, failing children, with grandchildren, and, failing grandchildren, with remoter lineal descendants of the deceased, the nearer excluding the more remote [s. 75]. Succession in this class is governed by the following rules :—

(1) *Father.*—The father takes $\frac{1}{6}$ as a Sharer if there is a lineal descendant ; as a residuary, if there be no lineal descendant [see Tab. of Sh., No. 3].

(2) *Mother.*—The mother is always a Sharer, and her share is 1/6 or 1/3 [see Tab. of Sh., No. 4].

(3) *Son.*—The son always takes as a Residuary.

(4) *Daughter.*—The daughter inherits as a Sharer, unless there is a son in which case she takes as a Residuary with him according to the rule of the double share to the male [see Tab. of Sh., No. 5].

(5) *Grandchildren.*—On failure of children, the grandchildren stand in the place of their respective parents, and they inherit according to the principle of representation described in ss. 80, 81, and 82, that is to say --

(i) the children of each son take the portion which their father, if living, would have taken as a Residuary, and divide it among them according to the rule of the double share to the male :

(ii) the children of each daughter take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary, and divide it among them also according to the rule of the double share to the male.

(6) *Remoter lineal descendants.* Succession among remoter lineal descendants is governed by the same principle of representation, that is to say, great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them according to the rule of the double share to the male, and great-great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them also according to the same rule.

Baillie, Part II, 276 279

Mode of distribution among husband or wife and heirs of the first class —

first, assign his or her share to the husband or wife [see Tab of Sh., Nos 1-2];
next, assign their shres to such of the claimants as can inherit as sharers only ;
next, divide the residue, if any, among the residuaries

lastly, if there be no residuary, and the sum total of the shares is *less* than unity apply the Doctrine of Return as stated in ss 93 to 96 ; and if the sum total *exceeds* unity, proceed as stated in s 97

Illustrations.

(a)	*Husband*	1/2 (as sharer)
	Mother	1/3 (as sharer)
	Father	1/6 (as residuary)

Note.—Under the Sunni law, the mother takes 1/3×1/2=1/6, and the father 1/3 as a residuary [see Tab. of Sh., Sunni law, No. 5].

(b) *Wife* .. .. 1/4 (as sharer)
Mother .. .. 1/3 (as sharer)
Father .. .. 5/12 (as residuary)

Note.—Under the Sunni law, the mother takes $1/3 \times 3/4 = 1/4$, and the father 1/2 as a residuary [see Tab. of Sh., Sunni law, No. 5].

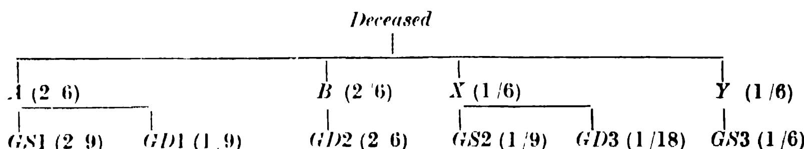
(c) *Father* .. .. 1/6 (as sharer)
Mother .. .. 1/6 (as sharer)
Son .. .. 2/3 (as residuary)

Note.—If instead of a son, there was a son's daughter, she would have taken 2/3 as representing her father.

(d) *Father* .. . . 1/6 (as sharer, because there are daughters)
Mother . .. . 1/6 (as sharer)
2 daughters .. . .. 2/3 (as sharers)

Note.—The shares would be the same if we substitute daughters' sons or daughters' daughters for daughters.

(e) A Shiah dies leaving a grandson *GS*1 and a granddaughter *GD*1 by a predeceased son *A*, a granddaughter *GD*2 by another predeceased son *B*, a grandson *GS*2 and a granddaughter *GD*3 by a predeceased daughter *X*, and a grandson *GS*3 by another predeceased daughter *Y*, as shown in the following diagram :—



Here the two daughters *X* and *Y*, if living, would have taken as residuaries with the two sons *A* and *B* according to the rule of the double share to the male, so that *A* and *B* would each have taken 2/6, and *X* and *Y* would each have taken 1/6.

A's share 2/6 will pass to his son and daughter according to the rule of the double share to the male, so that *GS*1 will take $2/3 \times 2/6 = 2/9$, and *GD*1 will take $1/3 \times 2/6 = 1/9$.

B's share 2/6 will pass to his daughter *GD*2.

X's share 1/6 will be divided between her son and her daughter according to the rule of the double share to the male, so that *GS*2 will take $2/3 \times 1/6 = 1/9$, and *GD*3 will take $1/3 \times 1/6 = 1/18$.

Y's share 1/6 will pass to her son *GS*3.

The shares will thus be $2/9 + 1/9 + 2/6 + 1/9 + 1/18 + 1/6 = 1$.

According to the Hanafi law *GS*1, *GD*1 and *GD*2 are residuaries, and they exclude *GS*2, *GD*3, and *GS*3 who are d. k. *GS*1 will take 1/2, and *GD*1 and *GD*2 will each take 1/4.

If in the case put above, the deceased left also a wife, the wife will first take her share 1/8, and the remaining 7/8 will be divided among the six grandchildren in the same proportions.

Distribution among Heirs of the Second Class.

84. Rules of succession among heirs of the second class.—If there are no heirs of the first class, the estate (*minus* the share of the husband or wife, if any) devolves upon the heirs of the second class. The second class of heirs comprises grandparents h. h. s. and brothers and sisters and their descendants h. l. s. [s. 75]. The rules of succession among the heirs of this class are different according as the surviving relations are—

(1) grandparents h. h. s., *without* brothers or sisters or their descendants ;

(2) brothers and sisters or their descendants, *without* grandparents or remoter ancestors ;

(3) grandparents h. h. s., *with* brothers and sisters or their descendants.

The first case is dealt with in s. 85. The second case is dealt with in ss. 86 and 87. The third case is dealt with in s. 88.

85. Grandparents h. h. s., without brothers or sisters or their descendants.—If there are no brothers or sisters, or descendants of brothers or sisters, the estate (*minus* the share of the husband or wife, if any) is to be distributed among grandparents according to the following rules :—

(1) If the deceased left all his four grandparents surviving, the paternal grandparents take two-thirds, and divide it between them according to the rule of the double share to the male, and the maternal grandparents take $\frac{1}{3}$, and divide it equally between them, as shown below :—

2/3	Father's father ..	.. 2/3×2/3=4/9=8/18
	Father's mother ..	.. 1/3×2/3=2/9=4/18
1/3	Mother's father ..	.. 1/2×1/3=1/6=3/18
	Mother's mother ..	.. 1/2×1/3=1/6=3/18

(2) If there is only one grandparent on the paternal side, he or she takes the entire $\frac{2}{3}$. Similarly, if there is only one grandparent on the maternal side, he or she takes the entire $\frac{1}{3}$, as shown below :—

(a)	Father's father	2/3
	Mother's father	1/3 (each taking 1/6)
	Mother's mother	

(b) Father's father } 2/3 .. } 2/3 × 2/3 = 4/9
Father's mother } .. } 1/3 × 2/3 = 2/9
Mother's mother 1/3 .. .. = 3/9

(c) Father's father 2/3
Mother's mother 1/3

(3) If there are no grandparents, the property will devolve according to the same rules upon remoter ancestors of the deceased, the nearer excluding the more remote.

Baillie, Part II, 281, 283.

86. Brothers and sisters, without any ancestor.—(*1*) If the deceased left no ancestors, but brothers and sisters of various kinds, the estate (*minus* the share of the husband or wife, if any) will be distributed among them according to the same rules as those in Hanafi law. The said rules are as follows :—

(i) Brothers and sisters of the full blood exclude consanguine brothers and sisters.

(ii) Uterine brothers and sisters are not excluded by brothers or sisters either full or consanguine, but they inherit with them, their share being 1/3 or 1/6 according to their number [see Tab. of Sh., Nos. 6 and 7].

(iii) Full brothers take as Residuaries ; so do consanguine brothers.

(iv) Full sisters take as sharers [see Tab. of Sh., No. 8], unless there be a full brother in which case they take as Residuaries with him according to the rule of the double share to the male. Consanguine sisters also take as sharers [see Tab. of Sh., No. 9] unless there be a consanguine brother with them in which case they take as Residuaries with him according to the same rule.

Baillie, Part II, 280.

Illustrations.

Note.—The shares of the several heirs in the following illustrations are the same both in Sunni and Shiah law. The illustrations are given to familiarize the student with combinations of heirs that are common in Shiah law :—

(a) *Husband* .. .. 1/2 (as sharer)
Full (or cons.) sister .. .. 1/2 (as sharer)

(b) *Wife* .. .. 1/4 (as sharer)
Full brother .. .. 3/4 (as residuary)

(c) *Husband* .. .. 1/2 (as sharer)
Full brother .. .. 2/3 × (1/2) = 1/3 } (as residuaries)
Full sister .. .. 1/3 × (1/2) = 1/6 }

(d) *Wife* .. .. 1/4 (as sharer)
Ut. brother .. .. 1/6 (as sharer)
Cons. Brother .. .. 2/3 × (7/12) = 7/18 } (as residuaries)
Cons. sister .. .. 1/3 × (7/12) = 7/36 }

87. Descendants of brothers and sisters, without any ancestor.—If there are no brothers or sisters of any kind, and no ancestors, but there are children of brothers and sisters, the estate (*minus* the share of the husband or wife, if any) will devolve upon them according to the principle of representation described in ss. 80, 81 and 82, that is to say—

(1) The children of each full or consanguine brother will take the portion which their father, if living, would have taken as a Residuary, and they will divide it among them according to the rule of the double share to the male; and the children of each full or consanguine sister will take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary, and they will divide it among them according also to the rule of the double share to the male.

(2) The children of each uterine brother will take the portion which their father, if living, would have taken as a sharer, and they will divide it *equally* among them; and so will the children of each uterine sister.

(3) If there are no children of brothers or sisters, the estate will devolve upon the grandchildren of brothers and sisters according to the principle of representation, that is to say, the grandchildren of full or consanguine brothers and sisters take the portion which their *respective* parents, if living, would have taken and divide it among them according to the rule of the double share to the male, and the grandchildren of uterine brothers and sisters take the portion which their *respective* parents, if living, would have taken, and divide it equally among them without distinction of sex.

Baillie, Part II, 284.

Illustrations.

(a) *Husband*	.. .. ..	1/2 (as sharer)
Ut. brother's daughter	..	1/6 (as sharer, being her father's portion)
Full brother's daughter	..	1/3 (as residuary, being her father's portion)
Cons. brother's son ..	..	0 (excluded by *full* brother's daughter)

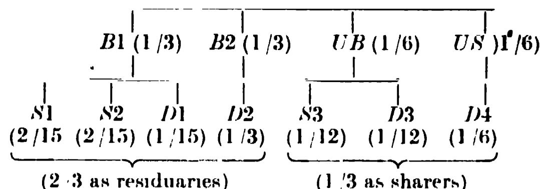
(b) Suppose the claimants to be as shown in the second line of the following diagram, that is to say,—

two sons and a daughter of a full brother, *B*1 ;

a daughter of another full brother, *B*2 ;

a son and a daughter of a uterine brother, *UB* ;

a daughter of a uterine sister, *US* ;



First, assign their respective shares to the brothers and sisters thus :—

UB and *US* . . 1/3 (as sharers), each taking 1/6 ;

*B*1 and *B*2 .. . 2/3 (as residuaries), each taking 1/3.

Next assign portions to their children thus :—

US's share 1/6 will go to her daughter *D*4 ;

UB's share 1/6 will be divided *equally* between *S*3 and *D*3, each taking 1/12 ;

*B*2's share 1/3 will go to his daughter *D*2.

*B*1's share 1/3 will be divided among his two sons and his daughter according to the rule of the double share to the male, so that *S*1 will take $2/5 \times 1/3 =$ 2/15, *S*2 will also take 2/15, and *D*1 will take $1/5 \times 1/3 = 1/15$

The shares will thus be $2/15 + 2/15 + 1/15 + 1/3 + 1/12 + 1/12 + 1/6 = 1$.

Suppose that in the case put above the children of the brothers and sisters had all predeceased the propositus, and that *S*1 had left a son and a daughter that *S*3 also had left a son and a daughter, and the remaining five nephews and nieces had each left a son. In that case the share of *S*1, that is, 2/15, would be divided between his son and his daughter according to the rule of the double share to the male, the son taking $2/3 \times 2/15 = 4/45$, and the daughter $1/3 \times 2/15 = 2/45$. The share of *S*3, that is, 1/12, would be divided *equally* between his son and daughter, they being descendants of a *uterine* brother, so that each would take 1/24. The sons of *S*2, *D*1, *D*2, *D*3, and *D*4, would take their respective parents' portion.

88. Grandparents and remoter ancestors with brothers and sisters or their descendants.—(*1*) If the deceased left grandparents, and also brothers or sisters, the estate (*minus* the share of the husband or wife, if any) is to be distributed among grandparents *and* brothers and sisters, according to the following rules :—

(a) A paternal grandfather counts as a full or consanguine brother, and a paternal grandmother counts as a full or consanguine sister.

(b) A maternal grandfather counts as a uterine brother, and a maternal grandmother counts as a uterine sister.

(2) On failure of grandparents, the remoter ancestors of the deceased stand in the place of the grandparents through whom they are respectively connected with the deceased. On failure of brothers or sisters, their descendants stand in the place of their respective parents.

Baillie, Part II, 281, 391-392 ; Wilson, s. 468.

The effect of the above rules is that when among heirs of the second class you find single brother or sister, full consanguine, or uterine, what you have to do is to substitute for grandparents so many brothers and sisters according to the above rules, and then assign shares to grandparents as if they were so many brothers and sisters, as is done in the following illustrations :—

(a) *Paternal grandfather* (= full brother) 2/3
Full sister 1/3

Note.—Here the full sister takes as a residuary with the paternal grandfather, the latter being counted as a full brother.

(b) *Paternal grandfather* (=consanguine brother) .. 2/3
Consanguine sister 1/3

Note.—Here the consanguine sister takes as a residuary with the paternal grandfather, the latter being counted as a consanguine brother.

(c) *Uterine brother* .. .. } 1/3 (each taking 1/6)
Maternal grandmother (=ut. sister) .. }
2 *full sisters* .. .. 2/3 (as sharers)

Note.—Here the maternal grandmother counts as a uterine sister, so that the case is the same as if we had a uterine brother and a uterine sister; these take 1/3 between them as sharers.

(d)			
Full brothers	..	4/18	2/3 as residuaries
Full sister	..	2/18	
Father's father (=full brother)	..	4/18	
Father's mother (=full sister) ..	..	2/18	
Mother's father (=ut. sister) ..	..	1/6	1/3 as shares
Mother's mother (=ut. sister) ..	..	1/6	

Note.—First substitute brothers and sisters for grandparents so, that we have 2 full brothers, 2 full sisters, one uterine brother and one uterine sister. The uterine brother and sister take 1/3 between them as sharers. The residue 2/3 is to be divided between full brothers and 2 full sisters as residuaries according to the rule of the double share to the male. Each brother therefore takes $2/6 \times 2/3 = 4/18$, and each sister $1/6 \times 2/3 = 2/18$. The result would be the same if instead of a full brother and a full sister in the above case, there were a consanguine brother and a consanguine sister.

(e)			
Uterine brother ..	.. =	1/9..	1/3 as sharers
Uterine sister ..	.. =	1/9..	
Mother's mother (=uterine sister)	.. =	1/9..	

Father's father (=con. brother)	.. = 1/3..	2/3 as residuaries
Father's mother (=con. sister)	.. = 1/6..	
Con. sister	.. = 1/6..	

Note.—Substitute " uterine sister " for " mother's mother," so that we have one uterine brother and two uterine sisters. Next as there is a *consanguine* sister, substitute " consanguine brother " for " father's father " and " consanguine sister " for " father's mother." The uterine brother and the two uterine sisters take collectively 1/3 as sharers. The residue 2/3 is to be divided between one consanguine brother and two consanguine sisters as residuaries according to the rule of the double share to the male. The brother therefore takes $2/4 \times 2/3 = 1/3$, and each sister takes $1/4 \times 2/3 = 1/6$.

(f)	*Husband*	1/2
	Father's father (= full brother)	1/2 as residuaries, each taking 1/4
	Full brother..	
(g)	*Wife*	1/4
	Uterine sister	1/3 as sharers, each taking 1/9
	Uterine brother	
	Maternal grandfather = (ut. brother) ..	
	Paternal grandfather	5/12 (as residuary)

Note.—In the case put above, it is all the same whether you count the paternal grandfather as a full brother or as a consanguine brother ; in either case he takes as a residuary.

(h)	*Full brother's son*	(1/2 being his father's share)
	Father's father (=full brother)	1/2

Note.—The above illustration is taken from Baillie, Part II, p. 327-328, 392.

Distribution among Heirs of the Third Class.

89. Order of succession among heirs of the third class.—(*1*) If there are no heirs of the first or second class, the estate (*minus* the share of the husband or wife, if any) devolves upon the heirs of the third class in the order given below :—

(1) Paternal and maternal uncles and aunts of the deceased.

(2) Their descendants h. l. s. the nearer in degree excluding the more remote.

(3) Paternal and maternal uncles and aunts of the parents.

(4) Their descendants h. l. s., the nearer in degree excluding the more remote.

(5) Paternal and maternal uncles and aunts of the grandparents.

(6) Their descendants h. l. s., the nearer in degree excluding the more remote ;

(7) Remoter uncles and aunts and their descendants in like order.

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Exception.—If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former, though he belongs to group (2), excludes the latter who is nearer and belongs to group (1).

Baillie, Part II, 285-286, 329 332.

Exception to sub-sec. (2)—The Shiahs are the followers of Ali Ali was a cousin of the Prophet. He was also the son-in-law of the Prophet, having been married to his favourite daughter Fatima. The Shiahs maintain that on the death of the Prophet the Caliphate (successorship to the Prophet) ought to have gone first to Ali, on the ground that he was the *nearest male heir* of the Prophet But the Prophet had also left a consanguine paternal uncle (named Abbas), and Ali was but a cousin of the Prophet, being the son of a full paternal uncle (Abu Taleb) of the Prophet. Ali ,therefore could not be the *nearest* male heir, unless the son of a full paternal uncle was entitled to succeed in preference to a consanguine uncle To uphold, however, the claim of Ali and that of the lineal descendants of the Prophet through Fatima, the Shiahs had to hold that the son of a full paternal uncle was entitled to succeed in preference to a consanguine paternal uncle, and this accounts for the exception to sub-sec (2) above.

No sharers in the third class of heirs.—The heirs of the third class are all residuaries. There is no sharer among them as will be seen on referring to the Table of Sharers given above.

90. Uncles and aunts.—To distribute the estate among uncles and aunts proceed as follows :

(1) *First*, assign $\frac{2}{3}$ of the estate to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and $\frac{1}{3}$ to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side (that is, $\frac{2}{3}$ of the estate) among the paternal uncles and aunts exactly as if they were brothers and sisters of the deceased, that is to say :—

(i) assign to uterine paternal uncles and aunts—

(a) if there be two or more of them, $\frac{1}{3}$ to be equally divided among them ;

(b) if there be only one of them, $\frac{1}{6}$;

(ii) divide the remainder among full paternal uncles and aunts according to the rule of the double share to the male, and, *failing them*, among consanguine paternal uncles and aunts according to the same rule.

(3) *Lastly*, divide the portion assigned to the maternal side, among the maternal uncles and aunts as follows :—

(i) assign to uterine maternal uncles and aunts—

(a) if there be two or more of them, $\frac{1}{3}$ to be equally divided among them ;

(b) if there be only one of them, $\frac{1}{6}$;

(ii) divide the remainder *equally* among full maternal uncles and aunts, and, *failing them*, among consanguine maternal uncles and aunts.

(4) If there be no uncle or aunt on the maternal side, the paternal side takes the whole. Similarly, if there be no uncle or aunt on the paternal side, the maternal side takes the whole.

Baillie, Part II, 285, 286, 329.

Note.—In working out examples, proceed in the order given in this section

(a)	2/3	*Full pat. uncle*	5/6 × 2/3 = 5/9
		Cons. pat. uncle ..	. = 0 (excluded by *full* pat. uncle)
		Ut. pat. uncle .	1/6 × 2/3 = 1/9
	1/3	*Full mat. uncle* ..	5/6 × 1/3 = 5/18
		Cons. mat. uncle ..	= 0 (excluded by *full* mat. uncle)
		Ut. mat. uncle .	1/6 × 1/3 = 1/18
(b)	2/3	*Full pat. aunt* .	2/3
		Cons. par. uncle ..	0 (excluded by *full* pat. aunt)
	1/3	*Ut. mat. aunt* ..	1/3
(c)		*Full pat. uncle* ..	2/3 (takes a double share, being a male)
		Full pat. aunt ..	1/3
(d)		*Full mat. uncle* ..	5/6
		Ut. mat. uncle ..	1/6 (being only one)
(e)	2/3	*Cons. pat. uncle* ..	5/6 × 2/3 = 5/9
		Ut. pat. uncle ..	1/6 × 2/3 = 1/9
	1/3	*Ut. mat. aunt* ..	.. = 1/3
(f)	2/3	*Full pat. uncle* .. / *Full pat. aunt* ..	2/3 × 2/3 = 4/9 .. 2/3 × 4/9 = 8/27 ; 1/3 × 4/9 = 4/27
		4 *Ut. pat. uncles* .. / 2 *Ut. pat. aunts* ..	1/3 × 2/3 = 2/9 (each taking 1/6 × 2/9 = 1/27)

1/3	1 *Ut. mat. uncle*	$1/2 \times 1/3 = 1/6$
	1 *Ut. mat. aunt*	$1/2 \times 1/3 = 1/6$

$$8/27+4/27+2/9+1/6+1/6=1$$

(g) *Full mat. uncle* .. 1/2
Full mat. aunt .. 1/2

Note.—Maternal uncles and aunts take equally without distinction of sex.

(h) *Ut. mat. uncle* .. } 1/3, each taking 1/6
Ut. mat. aunt .. }
Full mat. uncle .. } 2/3, each taking 1/3
Full mat. aunt .. }

Note.—The above result is in accordance with rule (3) above, namely, that full maternal uncles and aunts take equally without distinction of sex. This proposition, however, is not free from doubt. There is another possible view, namely, that full maternal uncles and aunts take equally only if there are no uterine maternal uncles and aunts [as in ill. (g)], and that if there be any such uncle or aunt (as in the above illustration), they take according to the rule of the double share to the male. According to this view the full maternal uncle in the above illustration is entitled to $2/3 \times 2/3 = 4/9$, and the full maternal aunt to $1/3 \times 2/3 = 2/9$. The same remarks apply to consanguine maternal uncles and aunts. See Baillie, Part II, pp. 285-286, and Querry's Translation of the Sharya-ul-Islam, ss. 214—219; Ameer Ali, Vol. II, pp. 144-145.

91. Descendants of uncles and aunts.—If there are no uncles or aunts of any kind, children of deceased uncles and aunts take the portion of their respective parents according to the principle of representation described in ss. 80, 81 and 82, the children of each full or consanguine paternal uncle or aunt dividing their parent's share among them according to the rule of the double share to the male, and the children of each of the remaining uncles and aunts, that is, of uterine paternal uncles and aunts and of maternal uncles and aunts whether full consanguine, or uterine, dividing their parent's share equally among them.

If there are no children of uncles and aunts, the grandchildren of uncles and aunts take the portion of their respective parents according to the same principle.

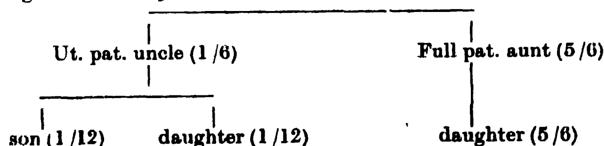
Baillie, Part II, 287.

Note.—In working out examples, first ascertain the hypothetical shares of uncles and aunts.

(a) The surviving relations are—

a son and a daughter of a uterine paternal uncle, and

a daughter of a full paternal aunt, as shown in the following diagram :—



The uterine uncle takes 1/6. The aunt of the full blood takes the residue 5/6. The uterine uncle's share 1/6 is to be divided *equally* between his son and daughter. The aunt's share 5/6 goes to her daughter.

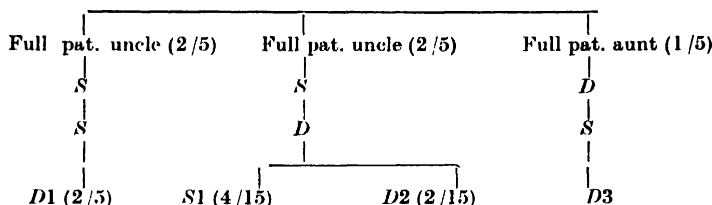
(b) *Paternal uncle's son* .. .. 2/3 (the portion of the *paternal* side)
Maternal aunt's son .. .. 1/3 (the portion of the *maternal* side)

(e) The surviving relations are (*u*)—

a great-granddaughter of a full paternal uncle, *D*1,

a great-grandson and a great-granddaughter of another such uncle, *S*1 and *D*2;

a great granddaughter of a full paternal aunt, *D*3



The two uncles take each twice as much as the aunt, so that each uncle takes 2/5 and the aunt takes 1/5. The first uncle's share 2/5 goes to his descendants *D*1.

The second uncle's share 2/5 is to be divided between his two descendants *S*1 and *D*2 according to the rule of the double share to the male, so that *S*1 takes 2/3 × 2/5 = 4/15, and *D*2 takes 1/3 × 2/5 = 2/15.

The aunt's share 1/5 passes to her descendant *D*3.

According to Hanafi law, the shares will be stated in ill. (*b*) to s. 65 above.

92. Other heirs of the third class.—If there are no descendants of uncles or aunts, the estate will devolve upon the other heirs of the third class in the order of succession given in sec. 89, the distribution among higher uncles and aunts being governed by the principles stated in sec. 90, and that among their descendants being governed by the principles stated in sec. 91.

Baillie, Part II, 287, 331-332.

The "Return" and the "Increase."

93. Doctrine of "Return."—If there is a residue left after satisfying the claims of Sharers, but there are no Residuaries *in the class to which the Sharers belong*, the residue reverts, subject to three exceptions noted in ss. 94, 95 and 96, to the sharers in the proportion of their respective shares.

Baillie, Part II, 262.

Note.—In working out examples, follow the rules given in the notes appended to ill. (f) and ill. (l) to sec. 53.

(*u*) *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540.

(a)	*Mother*	1/6 increased to 1/4,	
	Daughter..	1/2=3/6 ,, 3/4	
	Brother	0	(excluded, as being an heir of the second class).

Note.—By Hanafi law, the brother would have taken the residue 1/3.

(b)	*Mother*	1/6 increased to 1/5
	Father	1/6 ,, 1/5
	Daughter..	1/2=3/6 ,, 3/5

Note.—By Hanafi law, the father would have taken the residue 1/6 as a residuary.

(c)	*Ut. sister*	1/6 increased to 1/4
	Con. sister	1/2=3/6 ,, 3/4

Note.—Baillie, Part II, 335-336. If there was a full sister instead of a consanguine sister, the uterine sister would have been excluded from participating in the *Return*. See s. 96 below.

94. Husband and wife and "Return". Neither the husband nor wife is entitled to the *Return* if there is any other heir. If the deceased left a husband, but no other heir, the surplus will pass to the husband by *Return*. If the deceased left a wife, but no other heir, the wife will take her share 1/4, and the surplus will escheat to the Crown; in other words, the surplus never reverts to a wife.

Baillie, Part II, p. 262. See s. 79 and the notes thereto.

(a)	*Wife*	1/8			5/40
	Father	1/6 increased to 1/5		(7/8)	7/40
	Mother	1/6 ,,			7/40
	Daughter.. ..	1/2=3/6 ,,	3/5	(7/8)	21/40

Note.—By Hanafi law, the residue 1/24 would go to the father as a residuary.

(b)	*Husband*	1/4			4/16
	Father	1/6 increased to 1/4		(3/4)	3/16
	Daughter.. ..	1/2=3/6 ,,	3/4 ·	(3/4)	=9/16

Note.—By Hanafi law, the residue 1/12 would go to the father as a residuary.

95. Mother when excluded from "Return".—If the deceased left a mother, a father, and one daughter, and also—

(a) two or more full or consanguine brothers, *or*

(b) one such brother and two such sisters, *or*

(c) four such sisters,

the brothers and sisters, though themselves excluded from inheritance as being heirs of the second class, prevent the mother from participating in the *Return*, and the surplus reverts to the father and the daughter in the proportion of their respective shares. This is the only case in which the mother is excluded from the *Return*.

Baillie, Part II, 272, 317-318, 365, 386.

Mother	1/6		= 4/24
Father	1/6 increased to	1/4 × (5/6) =	5/24
Daughter	1/2 = 3/6 ,,	3/4 × (5/6) =	15/24
2 full brothers	0 (excluded).		

96. Uterine brothers and sisters when excluded from the "Return".—If there are uterine brothers or sisters, and also full sisters, the uterine brothers and sisters are not entitled to participate in the *Return*, and the residue goes entirely to the full sisters. This rule does not apply to consanguine sisters. Consanguine sisters and uterine brothers and sisters divide the *Return* in proportion to their shares.

Baillie, Part II, 335-336.

(a)	*Uterine brother* .. .		= 1/6
	Full sister .	1/2 (as sharer) + 1/3 (by Return)	= 5/6
(b)	*Uterine brother* .. .. *Uterine sister* .	1/3, each taking 1/6	
	Full sister ..	1/2 (as sharer) + 1/6 (by Return)	= 2/3
(c)	*Wife* ..	1/4 = 3/12	
	Uterine sister ..	1/6 = 2/12	
	Full sister ..	1/2 (as sharer) + 1/12 (by Return)	= 7/12

Note—The wife is not entitled to the "Return" (s. 94). The uterine sister is excluded from the "Return" by the full sister, and the latter takes the whole "Return."

Consanguine sister. There is a conflict of opinion as to whether a consanguine sister is entitled to the whole "Return" in the absence of a full sister. The author of the Sharaya-ul-Islam is of opinion that she is not. The author of the Kafi is of opinion that she is. See s. 93, ill. (c).

97. Doctrine of Increase.—The Sunni doctrine of "Increase" is not recognised in the Shiah law. According to the Shiah law, if the sum total of the shares exceeds unity, the fraction in excess of the unity is deducted invariably from the share of—

(a) the daughter or daughters ; or

(b) full or consanguine sister or sisters.

Baillie, Part II, 263, 396.

(a)	*Husband*	1/4 = 3/12	= 3/12
	Daughter	1/2 = 6/12 reduced to (6/12—1/12)	= 5/12
	Father	1/6 = 2/12	= 2/12
	Mother	1/6 = 2/12	= 2/12
		13/12	1

Note.—Here the excess over unity is 1/12, and this is to be deducted from the daughter's share.

(b)	*Husband*	.. 1/4=3/12		=3/12
	2 *daughters*	.. 2/3=8/12	reduced to (8/12—3/12)	=5/12 (each 5/24)
	Father	.. 1/6=2/12		=2/12
	Mother	.. 1/6=2/12		=2/12
		15/12		1
(c)	*Husband*	.. 1/2=3/6		=3/6=1/2
	2 *full* (*or cons.*) *sisters* ..	.. 2/3=4/6	reduced to (4/6—1/6)	=3/6=1/2 (each 1/4)
		7/6		
(d)	*Husband* ..	.. 1/2		
	Uterine sister or brother	1/6		
	Full (*or cons.*) *sister* ..	1/2	reduced to (1/2—1/6)=1/3.	
		7/6		

Reason of the rule.—The reason of the rule laid down in this section is stated to be that since a full sister, when co-existing with uterines, gets the full benefit of the "Return" (s. 93), it is but fair that when the sum total of the shares exceeds unity, she should bear the deficit. But what then of the *consanguine* sister ? According to the Sharaya-ul Islam, a *consanguine* sister is not entitled to the whole "Return" when she co-exists with uterines. Why then should *she* bear the deficit ?

Miscellaneous.

98. Eldest son.—The eldest son, if of sound mind, is exclusively entitled to the wearing apparel of the father, and to his Koran, sword and ring, provided the deceased has left property besides the said articles.

Baillie, Part II, 279.

99. Childless widow.—A childless widow is not entitled to a share in her husband's lands, but only to a share in his moveable property and in the value of buildings or other structures forming part of his estate.

Baillie, Part II, 295 ; *Mir Ali* v. *Sajuda Begam* (*v*) ; *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (*w*) ; *Muzaffar Ali* v. *Parbati* (*x*).

The expression "lands" in this section is not confined to *agricultural* land only ; it includes also lands forming the site of *buildings* : *Aga Mahomed Jaffer* v. *Koolsom Beebee* (*y*).

100. Illegitimate child.—An illegitimate child does not inherit at all, not even from his mother or her relations nor do they inherit from him.

Baillie, Part II, 305 ; *Sahebzadee Begum* v. *Himmut Bahadoor* (*z*).

(*v*) (1897) 21 Mad. 27.
(*w*) (1896) 19 All. 169.
(*x*) (1908) 29 All. 640.
(*y*) (1897) 25 Cal. 9.
(*z*) (1869) 12 W. R. 512, s. c. on review (1870) 41 W. R. 125.

CHAPTER IX.

WILLS.

[The leading authority on the subject of wills is the *Hedaya* (Guide), which was translated from the original Arabic into Persian by four Moulvees or Mahomedan lawyers, and from Persian into English by Charles Hamilton, by order of Warren Hastings, when Governor-General of India. The *Hedaya* was composed by Sheik Burhan-ud-Deen Ali who flourished in the twelfth century The author of the *Hedaya* belonged to the Hanafi School, and it is the doctrines of that school that he has principally recorded in that work. *The Fatawa Alamgiri*, another work of great authority, was compiled in the seventeenth century by command of the emperor Aurungzebe Alumgeer. It is "a collection of the most authoritative *futwas* or expositions of law on all points that had been decided up to the time of its preparation." The law there expounded is again the law of the Hanafi sect, as the Mahomedan sovereigns of India all belonged to that sect. The first part of Baillie's Digest of Mahomedan Law is founded chiefly on that work. Both the *Hedaya* and *Fatawa Alamgiri* deal with almost all topics of Mahomedan law, except that the Law of Inheritance is not dealt with in the *Hedaya*. The *Hedaya* is referred to in this and subsequent chapters by the abbreviation *Hed.*, and the references are given to the pages of Mr. Grady's Edition of "Hamilton's Hedaya." The leading work on Shiah law is *Sharaya-ul-Islam*, for which see the preliminary note to s. 74 above.]

101. Persons capable of making wills.—Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will.

Hed., 673 , Baillie, 627. The age of majority as regards matters other than marriage dower, divorce and adoption, is now regulated by the Indian Majority Act IX of 1875. Sec. 3 of the Act declares that a person shall be deemed to have attained majority when he shall have completed the age of eighteen years. In the case, however, of a minor, of whose person or property a guardian has been appointed, or of whose property the superintendence has been assumed by a Court of Wards, the Act provides that the age of majority shall be deemed to have been attained on the minor completing the age of twenty-one years.

Minority under the Mahomedan law terminates on completion of the fifteenth year; therefore, before the passing of Act IX of 1875, a Mahomedan who had attained the age of fifteen years was competent to make a valid disposition of his property (Ameer Ali, Vol. I., 10). But this rule of Mahomedan law, so far as regards matters other than marriage, dower and divorce (adoption not being recognised by that law), must be taken to be superseded by the provisions of the Majority Act, for the Act extends to the whole of British India (s.1), and applies to every person domiciled in British India (s.3). Hence minority in the case of Mahomedans, for purposes of wills, gifts, wakfs, etc., terminates not on the completion of the fifteenth year, but on completion of the eighteenth year (*a*),

Shiah law: *suicide*.—A will made by a person after he has taken poison, or done any other act towards the commission of suicide, is not valid under the Shiah law: Baillie,

(*a*) Compare *Bai Gulab* v. *Thakorelal* (1912) 36 Bom. 622, 17 I. C. 86.

Part II, 232. In *Mazhar Husen* v. *Bodha Bibi* (b), the deceased first made his will, and *then* took poison, and it was held that the will was valid, though he had contemplated suicide at the time of making the will.

102. Form of will immaterial.—A will (*wasiat*) may be made either verbally or in writing.

" By the Mahomedan law no writing is required to make a will valid, and no particular form, even of verbal declaration, is necessary as long as the intention of the testator is sufficiently ascertained " (c). In a recent case before the Privy Council a letter written by a testator shortly before his death and containing directions as to the disposition of his property, was held to constitute a valid will (d). The mere fact that a document is called *tamlik-nama* (assignment) will not prevent it from operating as a will, if it possesses the substantial characteristics of a will (e). But where a Mahomedan executed a document which stated *inter alia* " I have no son, and I have adopted my nephew to succeed to my property and title," it was held by the Privy Council that the document did not operate as a will, as there was a complete absence of intention *to give* in words. Their Lordships said : " He says he has no son, and he adopts somebody who may succeed. His son may succeed, *any other person* may succeed, if it is in the nature of a *testamentary* gift." The document, it was held, was not in the nature of a *testamentary* gift ; nor did it operate as a gift *inter vivos*, for there was no delivery of possession to the nephew in the lifetime of the deceased. The effect of the document was merely to declare the nephew in *general* terms to have the right to the entire property belonging to the deceased after his death, and such a declaration has no effect in Mahomedan law (f). The mere fact that the donor reserves the usufruct for himself does not render the transaction a will (g)

A Mahomedan will, though in writing, does not require to be signed (h) ; nor, even if signed, does it require attestation (i). The reason is that a Mahomedan will does not require to be in writing at all.

103. Bequests to heirs.—A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator (j). Any single heir may consent so as to bind his own share (k).

Explanation.—In determining whether a person is or is not an heir regard is to be had, not to the time of the execution of the will, but to the time of the testator's death.

Illustrations.

(a) A Mahomedan dies leaving him surviving a son, a father, and a paternal grandfather. Here the grandfather is not an " heir," and a bequest to him will be valid without the assent of the son and the father.

(b) (1898) 21 All. 91.
(c) *Mahomed Altaf* v. *Ahmed Buksh* (1876) 25 W. R. 121.
(d) *Mazhar Husen* v. *Bodha Bibi* (1898) 21 All. 91.
(e) *Saiad Kasim* v. *Shaista Bibi* (1875) 7 N W. P. 313; *Ishri Singh* v. *Baldeo* (1886) 11 I. A. 135, 141-143, 10 Cal. 792, 800-802
(f) *Jeswant Singjee* v. *Jett Singjee* (1844) 3 M. I. A. 245, 258 ; Macnaghten, p. 124, case 54.
(g) *Mohammad* v. *Fakhr Jahan* (1922) 49 I. A. 195, 44 All. 301, 68 I.C. 254,('22) A.P C. 281.
(h) *Aulla Bibi* v. *Alauddin* (1906) 28 All. 715.
(i) *In re Aba Satar* (1905) 7 Bom. L.R. 558 [Cutchi Memon will], *Sarabai* v. *Mahomed* (1919) 43 Bom. 641, 49 I. C. 637 [Cutchi Memon will]
(j) *Shek Muhammad* v. *Shek Imamudin* (1865) 2 B. H. C. 50 ; *Ahmad* v. *Bai Bibi* (1916) 41 Bom. 377, 39 I. C. 83, [Bhagdari property].
(k) *Salayjee* v. *Fatima* (1923) 1 Rang. 60, 63, 71 I C. 753, ('22) A. P. C. 391 [P.C.]

(b) *A*, by his will, bequeaths certain property to his father's father. Besides the father's father, the testator has a son and a father living at the time of the will. The father dies in the lifetime of *A*. The bequest to the grandfather cannot take effect, unless the son assents to it, for the father being dead, the grandfather is an "heir" at the time of *A*'s death.

(c) *A*, by his will, bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to *A*. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir *at the date of the will*, he is not an "heir" *at the death of the testator*, for he is excluded from inheritance by the son. If the daughter and the brother had been the sole surviving relatives, the brother would have been entitled to succeed as a "residuary" and the bequest to him could not then have taken effect, unless the daughter assented to it: *Baillie*, 625; *Hed.*, 672.

(d) *A* bequeaths certain property to one of his sons as his executor upon trust to expend such portion thereof as he may think proper "for the testator's welfare hereafter by charity and pilgrimage," and to retain the surplus for his sole and absolute use. The other sons do not consent to the legacy. The bequest is void, for it is "in reality an attempt to give, under colour of a religious bequest," a legacy to one of the heirs; *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 3 I. A. 291. It the bequest had been exclusively for religious purposes, and if those purposes had been sufficiently defined, it would have been valid to the extent of the bequeathable third.

(e) A Mahomedan leaves him surviving a son and a daughter. To the son he bequeaths three-fourths of his property, and to the daughter one-fourth. The daughter may not consent to the disposition, and she is entitled to claim a third of the property as her share of the inheritance; see *Fatima Bibee* v. *Ariff Ismailjee* (1881) 9 C.L.R. 66.]

Hed., 621; Baillie, 625, as to Explanation. Under the Mahomedan law a bequest to an heir is not valid without the consent of the other heirs (*l*). The policy of that law is to prevent a testator from interfering by will with the course of devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger (*m*). The reason is that a bequest in favour of an heir would be an injury to other heirs inasmuch as it would reduce their legitimate share, and "would consequently induce a breach of the ties of kindred" (Hed., 671). But this cannot happen if the other heirs, "having arrived at the age of majority," consent to the bequest. The consent necessary to give effect to the bequest must be given *after* the death of the testator, for no heir is entitled to any interest in the property of the deceased *in his lifetime*. It does not matter that the heir consenting to a bequest to a co-heir is an insolvent at the time when the consent is given (*n*).

Where a bequest is made *to an heir* subject to a condition which is void as being repugnant to the Mahomedan law, *e.g.*, that the legatee shall not alienate the property bequeathed, and the other heirs consent to the bequest, the legatee will take the property absolutely as he would have done if he were *a stranger* (*o*). Similarly where a bequest is made to an heir subject to the condition that in the event of his death the property shall go to *X*, and the other heirs assent to the legacy, the condition attached to the legacy being void, he will take the property absolutely (*p*). See s. 138 below.

(*l*) *Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683

(*m*) *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 196, 3 I. A. 291, 307.

(*n*) *Aziz-un-Nissa* v. *Chiene* (1920) 42 All. 593, 59 I. C. 296.

(*o*) *Abdul Karim* v. *Abdul Qayum* (1906) 28 All. 324.

(*p*) *Nasir Ali* v. *Sughra Bibi* (1920) 1 Lah. 302.

Bequests to heirs and strangers.—See notes to s. 104 under the same head.

Bequest of remainder.—A bequeaths the rents of a house to one of his sons for life, and after his death to a charitable society for the benefit of the poor. The other sons do not consent to the legacy. The bequest to the son being void for want of assent of the other sons, the subsequent bequest also does not take effect (*q*).

Shiah law.—Under the Shiah law, the consent of the other heirs is not necessary to validate a bequest to an *heir*, provided the bequest does not exceed the legal third (Baillie, Part II, 244). Where, however, the bequest to an heir exceeds one-third of the estate, it is not valid to any extent unless the other heirs consent to the bequest (Baillie, II, 233). Thus if a Shiah Mahomedan dies leaving a widow and a daughter, and he bequeaths to his widow by his will an interest for her life in the whole of his estate, and the remainder to his daughter, but the consent of the daughter to the bequest to the widow is not given, the bequest to the widow is void, though it is a bequest of merely a life-estate. The reason is that had the deceased died intestate, the widow would have taken $\frac{1}{8}$, and the daughter would have taken her share $\frac{7}{8}$ *immediately and absolutely*. The property must therefore be divided as on intestacy between the widow who will take $\frac{1}{8}$ and the daughter who will take $\frac{7}{8}$ (*r*). In an Allahabad case it was said that the consent must be obtained *after* the testator's death (*s*), but this statement of the law is not correct. Under the Shiah law consent given in the lifetime of the testator is sufficient to validate the bequest.

104. Limit of testamentary power.—A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator (*t*).

Baillie, 625. "Wills are declared to be lawful in the Koran and the traditions; and all our doctors, moreover, have concurred in this opinion" (Hed., 671). But the limit of one-third is not laid down in the Koran. This limit derives sanction from a tradition delivered by Abee Vekass. It is said that the Prophet paid a visit to Abee Vekass while the latter was ill and his life was despaired of. Abee Vekass had no heirs except a daughter, and he asked the Prophet whether he could dispose of the whole of his property by will to which the Prophet replied saying that he could not dispose of the whole, nor even two-thirds, nor one-half, but only one-third (Hed., 671). But though the limit of one-third is not prescribed by the Koran, there are indications in the Koran that a Mahomedan may not so dispose of his property by will as to leave his heirs destitute. See Sale's Koran, pp. 60-61, 95-96, and Preliminary Discourse, p. 98.

It will be seen from this and the preceding section that the powers of a Mahomedan to dispose of his property by will are limited in two ways, first, as regards *the persons* to whom bequests can be made, and, secondly, as regards *the extent to which* he can bequeath his property. The only case in which testamentary dispositions are binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir. But a bequest in excess of the legal third may be validated by the

(*q*) *Fatima Bibee* v. *Ariff Ismailjee* (1881) 9 C. L. R. 66 with facts slightly altered.

(*r*) *Amrit Bibi* v. *Mustafa* (1924) 46 All. 28, ('24) A. A. 20.

(*s*) *Fahmida* v. *Jafri* (1909) 30 All. 153.

(*t*) *Cherachom* v. *Valia* (1865) 2 M. H. C. 350.

consent of the heirs; similarly, a bequest to an heir may be rendered valid by the consent of the other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs, and the heirs may, if they like, forego the benefit by giving their consent. For the same reason, if the testator has no heirs, he may bequeath the whole of his property to a stranger (see Baillie, 625).

As to the consent of heirs to a legacy exceeding the legal third, it is to be remembered that the consent once given cannot be rescinded (Hed., 671). The consent need not be express: it may be signified by conduct showing a fixed and unequivocal intention. *A* bequeaths the whole of his property, which consists of three houses, to a stranger. The will is attested by his two sons who are his only heirs. After *A*'s death the legatee enters into possession and recovers the rents with the knowledge of the sons and without any objection from them. These facts are sufficient to constitute consent on the part of the sons, and the bequest will take effect as against the sons and persons claiming through them (*u*).

Bequests to heirs and strangers.—If bequests are made to heirs and also to strangers, the bequests to the heirs are invalid unless assented to by the other heirs, but the bequests to stangers are valid to the extent of one-third of the property. *A* bequeaths 1/3 of his property to *S*, a stranger, and 2/3 to *H*, one of his heirs. The other heirs do not assent to the bequest to *H*. The result is that *S* will take 1/3 under the will, and the remaining 2/3 will be divided among all the heirs of *A* (*v*). Similarly if *A* bequeaths the whole of his property to his wife and a stranger, and the bequest to the wife is not assented to by the other heirs of *A*, the stranger will take 1/3 under the will (that being the maximum disposable under the will), and the remaining 2/3 will be divided among the heirs of *A* (*w*).

Bequests for pious purposes.—Such bequests, like bequests to individuals, can only be made to the extent of the bequeathable third.

Commission to executor.—A commission to an executor by way of remuneration is "a gratuitous *bequest*, and. . . certainly *not* in any sense a *debt*." It is therefore subject to the rules contained in this and the preceding section (*x*).

Cutchi Memons.—A Cutchi Memon may dispose of the whole of his property by will; this is so by custom (*y*).

Shiah law.—Under the Shiah law, the consent necessary to validate a bequest exceeding the legal third *may* be given *in the lifetime* of the testator: Baillie, Part II, 233.

105. Abatement of legacies.—If the bequests exceed the legal third, and the heirs refuse their consent, the bequests abate in equal proportions.

Hed., 766; Baillie, 636-637.

Shiah law.—The Shiah law does not recognize the principle of rateable distribution. Under that law if a testator bequeaths 1/3 of his estate to *A*, 1/4 to *B*, and 1/6 to *C*, and the heirs refuse to confirm the bequests, *A*, the legatee first named, takes 1/3, and *B*

(*u*) *Daulatram* v. *Abdul Kayum* (1902) 26 Bom. 497. See also *Sharifa Bibi* v. *Gulam Mahomed* (1892) 16 Mad. 43.

(*v*) *Muhammad* v. *Aulia Bibi* (1920) 42 All. 497, 61 I. C. 947.

(*w*) (1920) 42 All. 497, at p. 502, 61 I. C. 947, *supra*.

(*x*) *Aga Mahomed Jaffer* v. *Koolsam Beebee* (1897) 25 Cal. 9, 18; *Salayjee* v. *Fatima* (1923) 1 Rang. 60, 71 I.C. 753, ('22) A.P.C. 391 [P.C.]

(*y*) *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 31 I. C. 106.

and *C* take nothing : Baillie, Part II. 235. But if, instead of 1/3, 1/12 was given to *A*, then *A* would take 1/12, and B would take 1/4, but *C*, who is last in order would not be entitled to anything, as 1/12+1/4 exhausts the legal third.

106. Bequests to unborn persons.—A bequest to a person not yet in existence at the testator's death is void; but a bequest may be made to a child in the womb, provided it is born within six months from the date of the will.

The legatee, according to Mahomedan law, must be a person *competent* to receive the legacy (Baillie, 624); he must therefore be a person in existence at the death of the testator (z). As to bequests to a child in the womb, see Hed., 674.

107. When a legacy lapses.—If the legatee does not survive the testator, the legacy cannot take effect, but it will lapse and form part of the estate of the testator.

Ameer Ali, 3rd ed., Vol. I, p. 507. Compare the Indian Succession Act, 39 of 1925, s. 105, which however, does not apply to Mahomedans.

Shiah law.—Under the Shiah law, the legacy would, in such a case, pass to the heirs of the legatee, unless it is revoked by the testator; but if the legatee should die without leaving any heir, the legacy would pass to the heirs of the testator (Baillie, Part II, 247).

108. Subject of legacy.—It is not necessary for the validity of a bequest that the thing bequeathed should be in existence at the time of making the will; it is sufficient if it exists at the time of the testator's death.

Baillie, 624. The reason is that a will takes effect from the moment of the testator's death, and not earlier. The subject of a *gift*, however, must be in existence *at the time of the gift*: see s.136.

108A. Alternative bequest.—A bequest *in futuro* or a contingent bequest is void (ss. 136-137), but not an alternative bequest.

A Cutchi Memon, who has no son at the date of his will, bequeaths the residue of his property in effect as follows: "Should I have a son, and if such son be alive at my death, my executors shall hand over the residue of my property to him; but if such son dies in my lifetime leaving a son, and the latter is alive at my death, then my executors shall hand over the residue to him. But if there be no son or grandson alive at my death my executors shall apply the residue to charity." The testator dies without having ever had a son. The residue will go to charity as directed by the will. The gift is not conditioned *in futuro*, but it is an absolute gift in the alternative: *Advocate-General v. Jimbabai* (1917) 41 Bom. 181, 284-286.

109. Revocation of bequests.—A bequest may be revoked either expressly or by implication.

(z) *Abdul Cadar* v. *Turner* (1884) 9 Bom. 158.

Hed., 674; Baillie, 628. Revocation is express, when the testator revokes the bequest in express terms, either oral or written. It is implied, when he does an act from which revocation may be inferred.

It is doubtful whether, if a testator deny that he ever made a bequest, the denial operates as a revocation; but the better opinion seems to be that it does not: Hed., 675; Baillie, 630.

110. Implied revocation.—A bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an extinction of the proprietary right of the testator.

Illustrations.

[(a) A bequest of a piece of land is revoked, if the testator subsequently builds a house upon it.

(b) A bequest of a piece of copper is revoked, if the testator subsequently converts it into a vessel.

(c) A bequest of a house is revoked, if the testator sells it, or makes a gift of it to another.]

Hed., 674, 675; Baillie, 628-629. The illustrations are taken from the Hedaya.

111. Revocation by subsequent will.—A bequest to one person is revoked by a bequest in a *subsequent* will of the same property to another. But a subsequent bequest, though it be of the same property, to another person in the *same* will, does not operate as a revocation of the previous bequest, and the property will be divided between the two legatees in equal shares.

Hed., 675; Baillie, 630.

111A. Probate of Mahomedan will.—(*1*) A Mahomedan will may, after due proof, be admitted in evidence, though no probate has been obtained (*a*).

(*2*) Except as regards debts due to the estate (s. 38), the executor of a Mahomedan will may establish his right to any part of the estate of the testator without taking out probate of the will (*b*).

Not so in cases governed by the Indian Succession Act, 1865, of which see s. 187 [now the Succession Act of 1925, s. 213], and those governed by the Hindu Wills Act, 1870, of which see s. 2, [now the Succession Act of 1925, s. 57]. Neither a Cutchee Memon (*c*) nor a Khoja (*d*) is governed by the Hindu Wills Act.

(*a*) *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255; *Sakina Bibee* v. *Mahomed Ishak* (1910) 37 Cal. 839, 8 I. C. 655. *Abdul Karim* v. *Karmali* (1920) 22 Bom. L. R. 708, 58 I. C. 270; *Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A. B. 392.

(*b*) 8 Bom. 241, 255, *supra*, 47 Bom. 231, 70 I.C. 268, ('22) A. B. 392, *supra*. But see 37 Cal. 839, 844, 8 I.C. 655, *supra*.

(*c*) *Haji Ismail*, in the matter of the will of (1860) 6 Bom. 452.

(*d*) (1920) 22 Bom. L. R. 708, 58 I.C. 270, *supra*.

As to *vesting* of estate in an executor, see s. 30 and notes thereto.

112. Executor need not be a Moslem.—It is not necessary that the executor of the will of a Mahomedan should be a Mahomedan.

A Mahomedan may appoint a Christian, a Hindu, or any non-Moslem as his executor: *Moohummud Ameenooden* v. *Moohummud Kubeerooden* (e); *Henry Imlach* v. *Zuhoor-oonnisa* (f).

113. Powers of executors.—The powers and duties of executors of a Mahomedan will are determined by the provisions of the Probate and Administration Act, 1881, in cases to which that Act applies, now the Indian Succession Act 39 of 1925.

See s. 30 and the notes thereto.

Per Sargent, C.J., in *Shaik Moosa* v. *Shaik Essa* (g). The Probate and Administration Act, 1881, applies amongst others to Mahomedans. Before the passing of that Act, the powers and duties of Mahomedan executors were determined by the Mahomedan law; since the passing of that Act, however, they are determined by the provisions of that enactment. The provisions of the Probate and Administration Act are now extended almost to the whole of British India, and it is not, therefore, necessary to set out the rules of Mahomedan law on the subject in greater detail than what has already been done (see notes to s. 30). The Probate and Administration Act has been repealed and re-enacted by the Indian Succession Act of 1925. It may here be noted that when there are several executors the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any one of them who has proved the will [Probate and Administration Act, s. 92, Succession Act of 1925, s. 311]. But if probate has not been obtained by any one of them, none of them is entitled to represent the estate alone or to exercise any of the powers of an executor alone (h).

(e) (1845) 4 S. D. A. [Beng.] 55.
(f) (1828) 4 S. D. A. [Beng.] 303.
(g) (1884) 8 Bom. 241, 256.
(h) (1884) 8 Bom. 241, 255-256, *supra*.

CHAPTER X.

DEATH-BED GIFTS AND ACKNOWLEDGMENTS.

114. Gift made during death-illness.—Gifts made by a Mahomedan during *marz-ul-maut* or death-illness cannot take effect beyond a third of the surplus of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such gifts take effect if made in favour of an heir, unless the other heirs consent thereto after the donor's death (*i*).

Explanation.—A *marz-ul-maut* is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death.

Hed., 684, 685; Baillie, 551-552.

Marz-ul-maut (*j*).—It is an essential condition of *marz-ul-maut*, that is, death-illness, that the person suffering from the *marz* (malady) must be under an apprehension of *maut* (death). "The most valid definition of death-illness is that it is one which it is *highly probable* will issue fatally" (Baillie, 552). Where the malady is of long continuance, as, for instance, consumption or albuminuria, and there is no immediate apprehension of death, the malady cannot be said to be *marz-ul-maut* but it may become *marz-ul-maut* if it subsequently reaches such a stage as to render death highly probable, and death does in fact ensue (*k*). According to the Hedaya, a malady is said to be of "long continuance," if it has lasted a year, so that a disease that has lasted for a period of one year does not constitute a death-illness: for "the patient has become familiarized to his disease, which is not then accounted as sickness" (Hed. 685). But "this limit of one year does not constitute a hard-and-fast rule, and it may mean a period of *about* one year" (*l*). In short, a gift must be deemed to be made during *marz-ul-maut*, if as observed by the Privy Council, it was made "under pressure of the sense of the imminence of death" (*m*).

In *Sarabai* v. *Rabiabai* (*n*), it was laid down that in order to establish *marz-ul-maut* there must be present at least three conditions:—

(1) proximate danger of death, so that there is a preponderance of apprehension of death.

(*i*) *Wazir Jan* v. *Saiyyid Altaf Ali* (1887) 9 All. 357; *Fazl Ahmed* v. *Rahim Bibi* (1918) 40 All. 238, 244, 51 I. C. 638.

(*j*) *Fatima Bibee* v. *Ahmad Baksh* (1903) 31 Cal 319, affmd. by P. C. 35 Cal. 271, 35 I. A. 67 [albuminuria for upwards of a year—not marz-ul-maut]; *Ibrahim Goolam Ariff* v. *Saiboo* (1908) 35 Cal. 1, 22, 34 I. A. 167, 177 [sudden bursting of a blood vessel in the stomach—not a case of marz-ul-maut], *Labbi Bibi* v. *Bibbun Bibi* (1874) 4 N.-W. P.H.C., 159; *Hassarat Bibi* v. *Goolam Jaffar* (1898) 3 C. W. N. 57 [long standing asthma—not marz-ul-maut]; *Muhammad Gulshere Khan* v. *Mariam Begam* (1881) 3 All. 731 [lingering illness—no marz-ul-maut]; *Sarabai* v. *Rabiabai* (1906) 30 Bom. 537 [paralysis—not a case of marz-ul-maut]; *Rashid Karmalli* v. *Sherbanoo* (1907) 31 Bom. 264 [rapid consumption—*held* marz-ul-maut]; *Janjira* v. *Mohammad* (1922) 49 Cal. 477, 489-494, 67 I. C. 77, ('22) A.C. 429 [not a case of marz-ul-maut], *Fazl Ahmed* v. *Rahim Bibi* (1918) 40 All. 238, 51 I. C. 638 [rapid consumption—*held* marz-ul-maut]; *Fazlur* v. *Mohammad* (1917) 3 Pat. L. W. 232, 43 I. C. 196.

(*k*) 40 All. 238, 243-244, 51 I.C. 638, *supra*.

(*l*) 31 Cal. 319, at p. 326, *supra*.

(*m*) 35 Cal. 1, 22, 34 I. A. 167, 177.

(*n*) (1906) 30 Bom. 537, 551; (1907) 31 Bom. 264, *supra*; (1922) 49 Cal. 477, 490, 67 I. C. 77, ('22) A. C. 429.

(2) **there must be some degree of subjective apprehension of death in the mind of the sick person ;**

(3) **there must be some external indicia, chief among which would be inability to attend to ordinary avocations.**

Shiah Law.—The same is the rule of Shiah law (*o*).

Sale.—The provisions of this section do not apply to a transfer for consideration, *e.g.*, a sale (*p*). A transfer of property made by a husband to his wife in lieu of dower is in effect a *sale*, though the transaction may be described as a gift (*q*). On the other hand, a transaction, though in reality a gift, may be described as a sale to evade the provisions of the law contained in this and the next following section ; to such a case the provisions of the present section will apply (*r*).

115. When valid.—A gift made during *marz-ul-maut* is subject to all the conditions necessary for the validity of a gift including delivery of possession by the donor to the donee.

Baillie, 551. As to the conditions necessary for the validity of gifts, see the chapter on Gifts below. See also the cases cited in the preceding section. A death-bed gift is essentially a gift, though the limits of the donor's power to dispose of his property by such a gift are the same as the limits of his testamentary power. It is therefore subject to all the conditions of a gift, including delivery of possession by the donor to the donee before the death of the donor.

116. Death-bed acknowledgment of debt.—An acknowledgment of a debt may be made as well during death-illness as " in health."

When the *only proof* of a debt is an acknowledgment made during death-illness, the payment of the debt is to be postponed until after the liquidation of debts acknowledged by the deceased while he was " in health " and debts proved by other evidence. But an acknowledgment of a debt made during death-illness in favour of an heir does not constitute any proof of the debt, and no effect is to be given to it at all.

Hed., 436, 437, 438, 684, 685 ; Baillie, 693-694. This section is to be read with that part of sec. 29 which refers to *priority* of debts.

(*o*) *Khurshed* v. *Faiyaz* (1914) 36 All. 289, 237. I. C. 253.

(*p*) *Fazl Ahmad* v. *Rahim Bibi* (1918) 40 All 238, 244-245, 51 I. C. 638

(*q*) *Esahaq* v. *Abedunnessa* (1914) 42 Cal 361, 28 I. C. 602

(*r*) 40 All 238, 244-245, 51 I. C. 638 *supra*.

CHAPTER XI.

Gifts.

117. Hiba or gift.—A *hiba* or gift is "a transfer of property, made immediately, and without any exchange."

Hedaya, 482. See Transfer of Property Act, 1882, s. 122 and also s. 129.

118. Person capable of making gifts.—Every Mahomedan of sound mind and not a minor may dispose of his property by gift.

Hedaya, p. 524. As to minority, see notes to s. 101.

119. Gift with intent to defeat creditors.—A gift made with intent to defeat or defraud the creditors of the donor is voidable at the option of the creditors. But such intention is not to be *inferred* from the mere fact that the donor owed some debts at the time of the gift (*s*).

According to the Transfer of Property Act 1882, s. 53, if the *effect* of a gift is to defeat creditors, the gift may be *presumed* to have been made with intent to defeat the creditors. It is not clear whether such intent may be *presumed* at all under the Mahomedan law, but it is certain that it cannot be *inferred*. S. 53 of the Transfer of Property Act does not override any rule of Mahomedan law to the contrary [see s. 2, cl. (d), of that Act].

120. Gift to unborn persons.—A gift to a person not yet in existence is void (*t*).

121. Extent of donor's power.—A gift, as distinguished from a will, may be made of the whole of the donor's property, and it may be made even to an heir.

"The policy of the Mahomedan law appears to be to prevent a *testator* interfering by *will* with the course of the devolution of property according to law among his *heirs*, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law *by giving in his lifetime the whole or any part of his property* to one of his sons provided he complies with certain forms." (*u*)

It need hardly be stated that a Mahomedan may dispose of the whole of his property by *gift* in favour of a *stranger*, to the entire exclusion of his *heirs*.

(*s*) *Azim-un-nissa* v. *Dale* (1871) 6 Mad. H. C. 455, 468-469; *Abdool Hye* v. *Meer Mahomed* (1886) 11 I. A. 10, 10 Cal. 616; Macnaghten, p. 217 (case 15), p. 510 (case 44); Ameer Ali, Vol. I, pp. 16-19.

(*t*) *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158; *Mahomed Shah* v. *Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I. C. 291.

(*u*) *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I. A. 291, 307; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1905) 28 All. 439, 449, 33 I. A. 68, 75; *Sadik Husain* v. *Hashim Ali* (1916) 43 I. A. 212, 221, 38 All. 627, 645-646, 36 I. C. 104.

122. Gift of actionable claims and incorporeal property.—Actionable claims and incorporeal property may form the subject of gift equally with corporeal property (*v*).

A gift may be made of debts, negotiable instruments, or of Government promissory notes (*w*); of *malikana* (*x*) or of zemindari (*y*) rights; also of property let on lease (*z*), and property under attachment (*a*). Similarly, a gift may be made of a right to receive a specified share in the offerings that may be made by pilgrims at a shrine (*b*).

"*Hiba* in its literal sense signifies the donation of a *thing from which the donee may derive a benefit*:" *Hed.*, 482. "Gift, as it is defined in law, is the conferring of a *right of property* in something specific, without an exchange." *Baillie*, 515.

The cases cited in para. 1 above would not have arisen at all, had it not been for the wrong notion which prevailed at one time that *khas* or physical possession was necessary in *all cases* to constitute a valid gift. Conformably to that notion, it was contended in those cases that corporeal property alone could form the subject of gifts, that being the only kind of property that is capable of *khas* or physical possession. But that notion has long since been rejected as erroneous, and it has been held that when the subject of gift is not capable of physical possession as in the case of choses in action and incorporeal rights, the gift may be completed by any act on the part of the donor showing a clear intention to divest himself of the ownership in the property. Note that debts, negotiable instruments and Government promissory notes are all choses in action, or, to use the language of the Transfer of Property Act, actionable claims. See s. 126 below.

123. Gift of equity of redemption.—A gift may be made by a mortgagor of his equity of redemption. But it has been held by the High Court of Bombay that a gift of an equity of redemption is not valid, if the mortgagee is in possession of the property at the date of the gift (*c*). According to the Calcutta High Court, a gift of an equity of redemption is valid even if the mortgagee was in possession at the date of the gift (*d*).

The Bombay High Court does not hold that an equity of redemption could not form the subject of a gift in any case. What it does hold is that a gift of an equity of redemption is not valid if the property at the time of gift is *in the possession of the mortgagee*. The ground of the Bombay decisions is that delivery of possession by the donor to the donee is a condition essential to the validity of a gift, and the mortgagor cannot deliver possession to the donee if the mortgagee is in possession. It is quite true that delivery of possession by the donor is a condition necessary for the validity of a gift, but it is equally well established that when the subject of a gift is not in its nature capable of actual possession, the gift may be perfected by appropriate acts on the part of the donor which may have the effect of transferring the ownership (s. 126). When the mortgagee is *not* in possession of the mortgaged property, a gift of the equity of

(*v*) See the cases cited in the Illustration
(*w*) *Mullick Abdul Gaffor* v. *Mulek* (1884) 10 Cal 1112, 1125
(*x*) *Ib.*, p. 1125
(*y*) *Ib.*, p 1126.
(*z*) *Ib.*, p. 1125.
(*a*) *Anwari Begum* v. *Nizam-ud-Din Shah* (1888) 21 All 165, 167.
(*b*) *Ahmad-ud-Din* v. *Ilakhi Baksh* (1912) 34 All. 465, 14 I.C 587.
(*c*) *Ismal* v. *Ramji* (1899) 23 Bom. 682; *Mohinudin* v. *Manchersha* (1882) 6 Bom. 650.
(*d*) *Tara Prasanna* v. *Shandi Bibi* (1922) 49 Cal. 68, ('22) A.C. 422, 75 I.C. 319.

redemption is not valid unless the mortgagor delivers possession of the property to the donee; for the mortgagee not being in possession, the mortgagor *can* deliver possession of the mortgaged property to the donee. But when the mortgagee *is* in possession, the mortgagor *cannot* deliver possession to the donee, and the gift, it is submitted, may in that event be completed by some other appropriate method. If this be so, the Bombay decisions cannot be correct. The correctness of those decisions was questioned by the High Court of Allahabad (*e*), and they have been recently dissented from by the Calcutta High Court.

The following is a peculiar case: *A* owns six immoveable properties. He mortgages three with possession to *M*. He then makes a gift of all the six properties to *D* and puts him in possession of the three properties not mortgaged to *M*. Is the gift to *D* of the equity of redemption of the three properties in the possession of *M* valid? The High Court of Bombay has held that it is, the reason given being that the deed of gift should be looked at as a whole (*f*).

124. Gift of property held adversely to donor.—A gift of property in the possession of a person who claims it adversely to the donor is not valid, unless the donor obtains and *delivers* possession thereof to the donee [ill. (a)], or does all that he can to complete the gift so as to put it within the power of the donee *to obtain* possession [ill. (b)].

[(a) *A* executes a deed of gift in favour of *B*, conferring upon him the proprietary right to certain lands then in the possession of *Z*, and claimed by *Z* adversely to *A*. *A* dies without acquiring possession of the lands. After *A*'s death, *B* sues *Z* to recover possession from him. The suit must fail, for the gift was not completed by delivery of possession to *B*. *Meeraly* v. *Tajudin* (1888) 13 Bom. 156; *Rahim Buksh* v. *Muhammad Hassan* (1888) 11 All. 1; Macnaghten, p. 201, case 6; *Fakir Ninar* v. *Kandasawmy* (1912) 35 Mad. 120, 128-131, 14 I. C. 993.

(b) *A* executes a deed of gift of immoveable property in favour of *B*. At the date of the gift the property is in possession of *C* who claims to hold it adversely to *A*. *B* sues *C* to recover possession of the property from him, joining *A* in the suit as a party defendant. *A* by his written statement *admits B's claim*. *C* contends that the gift is void, inasmuch as *A* was out of possession at the date of the gift, and no possession was ever given to *B*. The gift is valid though no possession was delivered by the donor to the donee. Their Lordships of the Privy Council said: "But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor. The person who disputes it claims adversely to both. *The donor has done all that she can to complete the gift and is a party to the suit, and admits the gift to be complete.*" *Kalidas* v. *Kanhaya Lal* (1884) 11 Cal. 121, 11 I. A. 218, a case under the Hindu law, followed in *Mahomed Buksh* v. *Hoosein Bibi* (1888) 15 Cal. 684, 701-702, 15 I. A. 81, case under the Mahomedan law.]

125. Writing not necessary.—Writing is not necessary to the validity of a gift either of moveable or of immoveable property (*g*).

(*e*) *Rahim Baksh* v. *Muhammad Husan* (1888) 11 All. 1, 10; *Anwari Begum* v. *Nizam-ud-din* (1898) 21 All. 165, 170, 171.

(*f*) *Chandsaheb* v. *Gangabai* (1921) 45 Bom. 1296, 64 I.C. 21.

(*g*) In *Kumar-un-nissa Bibi* v. *Hussaini Bibi* (1880) 3 All. 267, the Privy Council upheld a verbal gift. See also Baillie, 509

Ss. 122-129 (Chapter VII) of the Transfer of Property Act, 1882, deal with gifts. By s. 123 of the Act it is provided that a gift of immoveable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of moveable property may be effected either by a registered instrument signed as aforesaid or by delivery. But the provisions of s. 123 do not apply to Mahomedan gifts (see s. 129 of the Act). A gift under the Mahomedan law is to be effected in the manner prescribed by the Mahomedan law (s. 126). If the formalities prescribed by that law (s. 126) are complied with, the gift is valid even though it is not effected by a registered instrument, and though, where effected by an instrument, the instrument is not attested (*h*). But if the formalities are not complied with, the gift is not valid even though it may have been effected in the manner prescribed by s. 123 of the Transfer of Property Act. See notes to s. 126.

126. Necessary formalities. —It is essential to the validity of a gift that there should be—

(1) a declaration of gift by the donor :

(2) an acceptance of the gift by the donee, either impliedly or expressly ; and

(3) that the gift should be accompanied by a delivery of possession such as the subject of the gift is susceptible of (*i*), or, as stated in a recent case by the Privy Council, "the taking of possession of the subject-matter of the gift by the donee, either actually or constructively" (*j*).

Registration does not cure the want of delivery of possession.

[*A* executes a deed of gift of a dwelling house belonging to him in favour of *B*. The deed is duly registered, but no sort of possession is delivered to *B*. The gift is incomplete, and therefore void. *Mogulsha* v. *Mahamed Saheb* (1887) 11 Bom 517. *Ismal* v. *Ramji* (1889) 23 Bom 682. *Vahazullah* v. *Boyapati* (1907) 30 Mad 519.]

It has been stated above (s. 125) that writing is not necessary to the validity of a gift. But if there be an instrument of gift, the instrument, in order that it may be admissible in evidence, must, if it relates to *immoveable* property, be registered, not under the provisions of the Transfer of Property Act, for those provisions do not apply to Mahomedan gifts [see s. 125 above], but under the Registration Act, 1908 : see Registration Act, s. 17 (a) and s. 49.

Constructive possession — Where a donor makes a gift of the corpus of a property, but reserves the usufruct to himself and continues in physical possession of the property, the payment by the donee of Government revenue after the date of the gift in respect of the property amounts to *constructive* possession of the property on the part of the donee, and the gift is completed by such possession (*k*).

(*h*) *Karam Ilahi* v. *Sharf-ud-Din* (1916) 38 All 35 I C 14.

(*i*) *Sadik Husain* v. *Hashim Ali* (1916) 43 I A 212, 221-222, 38 All 627, 645-646, 36 I C 104, *Khajooroonissa* v. *Roushan Jehan* (1876) 2 Cal 184 197, 3 I A 291, 307, *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1906) 28 All 439, 449, 33 I. A 68, 75, *Tara Prasana* v. *Shandi Bibi* (1922) 49 Cal 68, 75 I C 319, ('22) A.C. 422.

(*j*) *Mohammad* v. *Fakhr Jahan* (1922) 49 I. A. 195, 209, 44 All 301, 315, 68 I C. 254, ('22) A P. C. 281.

(*k*) (1922) 49 I A 195, 210, 44 All. 301, 316, 68 I. C. 254, ('22) A P C 281, *supra*.

Hed., 482; Baillie, 520-522. "A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it": *Macnaghten*, p. 51, s. 8.

Burden of proof.—"By the Muhammadan law a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply [that is *hiba*], or by deed of gift coupled with consideration, that is, *hiba-bil-iwaz* [as to which see s. 141]. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in præsenti* of the property, and to confer it upon the donee, must also be proved" (*l*). As to the reason why clear proof of compliance with the formalities is necessary, see the notes to s. 121.

A declaration by the donor in the deed of gift that possession has been given binds the heirs of the donor (*m*).

Subsequent delivery—Where possession is not delivered at the time of gift, that is at the time of declaration and acceptance, it may be delivered subsequently, but the gift does not become complete until then (*n*).

Ss. 127 and 128 deal respectively with the mode of delivery of possession in the case of (1) immoveable property, and (2) incorporeal property and actionable claims.

126A. Gift through the medium of a trust.—A gift may be made through the medium of a trust. The same formalities are necessary for the validity of such a gift as those for a gift to the donee direct (s. 126), with this difference that the gift should be accepted by the *trustees*, and possession also should be delivered to the *trustees* (*o*).

[*A*, a Shiah Mahomedan, executes a deed purporting to transfer certain immoveable properties to *B*, *C* and *D* as trustees for the benefit of his wife and children. The deed is executed by *A* and it is registered. It is not executed by *B*, *C* and *D* or any of them. None of the properties is transferred to the names of the trustees, and *A* continues to be in receipt and enjoyment of the rents as before. Here there is no acceptance of the trust by the trustees, nor is there any delivery of possession to the trustees. The gift is therefore void: *Sadik Husain* v. *Hashim Ali* (1916) 43 I. A. 212, 218-224, 38 All. 627, 642-648, 36 I. C 104].

The introduction of trustees is merely the employment of machinery whereby the gift is carried into effect (*p*). Acceptance of a trust by trustees is indicated by their executing the deed of trust. In the case put above, the deed was not executed by the trustees, and hence there was no acceptance.

(*l*) *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1906) 28 All 439, 448-449, 33 I A. 68, 75, *Khajooroonissa* v *Rowshan Jehan* (1876) 3 I. A. 291, 307, 2 Cal. 184, 197, *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A 212, 221, 38 All. 627, 645-646, 36 I C. 104, *Gulam Jafer* v. *Mashidin* (1881) 5 Bom. 238, 242

(*m*) *Muhammad Mumtaz* v *Zubaida Jan* (1889) 11 All. 460, 16 I A 205.

(*n*) Macnaghten, p. 50, s 4: Baillie, Part II, 207, 43 I A 212, 222-223, 38 All 627 646-647, 36 I.C. 104, *supra*, *Maulani* v. *Maula Baksh* (1924) 46 All. 260, 262-263, 78 I. C 222, ('24) A.A 307.

(*o*) *Sadik Husain* v *Hahshim Ali* (1916) 43 I A 212, 218-224, 38 All 627, 642-648, 36 I.C 104; *Moosabhai* v *Yacoobbhai* (1904) 29 Bom. 267, 274-276 [a Khoja case], *Jainabai* v. *Setna* (1910) 34 Bom 604, 6 I.C. 513. *Casamally* v. *Currimbhai* (1911) 36 Bom. 214, 259-260, 12 I.C 225 [a Khoja case]; *Ram Charan* v. *Fatima Begam* (1915) 42 Cal 933, 938, 30 I.C. 686 (a case of wakf)

(*p*) 42 Cal 933, 938, 30 I.C. 686, *supra*.

127. Delivery of possession of immoveable property.—(*1*) *Where donor in possession.*—A gift of immoveable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession (*q*).

(*2*) *Where property let out to tenants.*—A gift of immoveable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee (*r*).

(*3*) *Where donor and donee both reside in the property.*—No physical departure or formal entry is necessary in the case of a gift of immoveable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift (*s*). This rule has been applied mainly to cases in which the donor stands *in loco parentis* to the donee (*t*).

(*4*) *Gifts as between husband and wife.*—The rule laid down in sub-sec. (3) applies to gifts of immoveable property by a wife to the husband (*u*), and by a husband to the wife, whether the property be one which is used by them for their joint residence (*v*), or is let out to tenants (*w*). The fact that the husband continues to live in the house or to receive the rents thereof after the making of the gift to the wife will not invalidate the gift, provided that the rents are collected by him as her manager (*x*).

[*Illustration of sub-section* (3).—A Mahomedan lady, who had brought up her nephew as her son, executed a deed of gift in favour of the nephew of a house in which they were both residing at the time of the gift. The donor did not physically depart from the house either at the time of the gift or at any subsequent period, but continued to live in the house with her nephew. The property was transferred to the name of the nephew, and the rents were recovered in his name. *Held* that the gift was complete, though there was no formal delivery of possession : *Humera Bibi* v. *Najm-unnissa* (1905) 28 All. 147.]

Gift from husband to wife.—In *Amina Bibi* v. *Khatija Bibi* (*y*), the gift was from a husband to the wife, and the gift consisted of a house in which the husband and wife lived together, and of a chawl (adjoining the house) which was let out to tenants. Sir M. Sausse, C.J., said: "In my opinion, the relation of husband and wife and his

(*q*) Macnaghten, p. 231, Prec. XXII.

(*r*) *Shaik Ibhram* v. *Shaik Suleman* (1884) 9 Bom. 146, 150; *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468, 477; *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 197 3 I. A. 291, 308.

(*s*) *Shaik Ibhram* v. *Shaik Suleman* (1884) 9 Bom. 146; *Abdul Majidkhan* v. *Husseinbee* (1920) 22 Bom. L. R. 229, 55 I. C. 952.

(*t*) *Humera Bibi* v. *Najam-un-nissa* (1905) 28 All. 147 [aunt to nephew]; *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468 [gift to daughter-in-law and her children]; *Kandath* v. *Musaliam* (1907) 30 Mad. 305 [mother to daughter]. But see *Bava Sahib* v. *Mahomed* (1896) 19 Mad. 343.

(*u*) Macnaghten, p. 51, s. 9.

(*v*) *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H. C. 157; *Azim-un-nissa* v. *Dale* (1868) 6 Mad. H. C. 455.

(*w*) *Emnabai* v. *Hajirabai* (1888) 13 Bom. 352.

(*x*) 1 Bom. H. C. 157, 162, *supra*; 13 Bom. 352, 354-355, *supra*.

(*y*) 1 Bom. H. C. 157, 162, *supra*.

legal right to reside with her and to manage her property rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba* (gift), and in the husband generally receiving the rents of the chawl annexed to the house."

128. Delivery in case of incorporeal property and actionable claims.—When the subject of the gift is incorporeal property or an actionable claim, the gift may be completed by any act on the part of the donor showing a clear intention on his part to divest himself *in praesenti* of the property, and to confer it upon the donee.

[(a) A gift of Government promissory notes may be completed by endorsement and delivery to the donee: *Nawab Umjad Alleykhan* v. *Muhumdee Begam* (1867) 11 M.I.A. 517, 544.

(b) A gift of zamindari rights, held under Government, may be completed by mutation of names in the books of the Collector: *Sajjad Ahamd Khan* v. *Kadri Begam* (1895), 18 All. 1.

(c) *A* hands over to his wife a receipt passed to him by a bank in respect of money deposited by him with the bank, and says "after taking a bath I will go to the bank and transfer the papers to your name" The receipt contains in the margin the words "not transferable." *A* dies before the transfer is effected. The gift is not complete: *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 17. The receipt being "not transferable," the donor's right to receive the money from the bank cannot be transferred by a mere delivery of the receipt]

As regards delivery of possession, a distinction ought to be drawn between cases where from the nature of the subject of the gift actual possession could not be given to the donee and cases where such possession could be given to the donee (*z*). "There is no doubt that the principle of Mahomedan law is tht possession is necessary to make a good gift, but the question is, possession of what? If the donor does not transfer to the donee, so *far as he can*, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our judgment, nothing in the Mahomedan law to prevent the gift of a *right* to property. The donor must, *so far as it is possible for him*, transfer to the donee that which he gives, namely, such right as he himself has; but this does not imply that where a *right to property* forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divesting himself *so far as he can*, of the whole of what he gives" (*a*). Thus in *Mahomed Buksh* v. *Hosseini Bibi* (*b*), their Lordships of the Privy Council in upholding a gift of an *undivided share* in the estate of a deceased Mahomedan by an heir of the deceased to her co-heirs, observed: "In this case it appears to their Lordships that *the lady did all she could to perfect the contemplated gift*, and that nothing more was required from her." In fact, in considering the question of delivery of possession, regard must be had to the nature of the property which forms the subject of the gift. If the gift be of a share of inheritance not yet divided off, as in the Privy Council case cited above, it is impossible for the donor to deliver *actual* possession of the share, and the gift may then be completed by any act on the part of the donor which may have the effect of transferring the ownership. And this, it was held by their Lordships, was done by the donor in the case cited above. It must, however, be noted that in that case the gift was by an heir to a co-heir (s. 134).

... *ffoor* v. *Mulcka* (1884) 10 Cal. 1112.

(*a*) *Anwari Begum* v. *Nizam-ud-din-Sha* (1898) 21 All. 165, 170-171.

(*b*) (1888) 15 Cal. 684 L. R. 15 I. A. 81.

129. Gift to a minor by his father or guardian.—No change of possession is necessary in the case of a gift by a father to his minor child or by a guardian to his ward (*c*).

Hed., 484; *Baillie*, 538, *Macnaghten*, p. 51, s. 9. "Where there is on the part of a father or other guardian a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor" 15 Beng. L R. 67, 78, L R 2 I. A 87, 104.

The guardian referred to in this section is the guardian of the *property* of a minor. The following persons are entitled in order to the guardianship of the property of a minor, namely, (1) the father, (2) his executor, (3) the father's father and (4) his executor. The mother is not in law the guardian of the property of her infant child, hence a gift by a *mother* to her infant child *does* require transfer of possession from her to the child's father, and, if the father be dead, to his executor, and if there be no executor, to the child's father's father, and if he be dead, to his executor But if there be none of these, no change of possession is necessary in the case of a gift by a mother to her infant child, or in the case of a gift by any other person to a minor under his care (s 130)

130. Gift to a minor by a person other than his father or guardian. —A gift to a minor or to a lunatic by a person other than his father or guardian may be completed by delivery of possession to his guardian.

"When [the donee] is a minor or insane, the right to take possession for him belongs to his guardian, who is first his father then his father's executor then his grandfather, then his executor If there be none of these possession may be taken for the minor by any person under whose power he may happen to be (s 262 B) *Baillie*, 539 *Hed.*, 484, *Macnaghten* p 51 s 10 Of course, no change of possession is necessary where the guardian himself is the donor (s 129)

131. Gift to a bailee.— Where the subject of the gift is already in the possession of the donee as bailee, the gift may be completed by declaration and acceptance, without formal delivery and possession.

[(a) A gift of a property in the possession of a bailee lessee, pledgee, or mortgagee may be completed without formal transfer of possession *Hed*, 464, *Baillie*, 522

(b) *A* makes a gift of a house to a servant in his employ for the collection of *rents* There is no evidence of any overt act showing transfer of possession of the property.' The gift is void, for a servant or an agent for the collection of rents cannot be said to be in "possession" of the *house* of which he collects the rents. *Valayat Hossein* v. *Maniarm* (1879) 5 C. L R 91]

132. Mushaa defined. -*Mushaa* is an *undivided* share in property whether moveable or immoveable.

133. Gift of mushaa where the property is indivisible.—A valid gift may be made of an undivided share [*mushaa*] in property which is *not capable* of partition.

[*A*, who owns a house, makes a gift to *B* of the house and of the right to use a staircase held by her jointly with the owner of an adjoining house. The gift of *A*'s undivided share in the staircase, though it is a gift of a *mushaa*, is valid, for a staircase is *not capable* of division: *Kasim Husain* v. *Sharif un Nissa* (1883) 5 All. 285]

(*c*) *Ameeroonissa* v *Abadoonissa* (1875) 15 Beng L R 67, 78, 2 I A 87 104 *Fatima Bibi* v *Ahmad Baksh* (1904) 31 Cal 319, 330

134. Gift of mushaa where the property is divisible.—A gift of an undivided share (*mushaa*) in property which is *capable of partition* is invalid (*fàsid*), but not void (*bátil*). The gift being invalid, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him [ill. (a)].

Exceptions.—A gift of an undivided share, though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases :—

(1) where the gift is made by one cô-heir to another [ill. (b)];

(2) where the gift is of a share in a zemindari or taluka [ill. (c)];

(3) where the gift is of a share in freehold property in a large commercial town [ill. (d)];

(4) Where the gift is of shares in a land company (*d*).

[(a) *A* makes a gift of her undivided share in certain lands to *B*. The share is not divided off at the time of gift, but it is *subsequently* separated and possession thereof is delivered to *B*. The gift, though invalid in its inception, is validated by subsequent delivery of possession: *Muhammad Mumtaz* v. *Zubaida Jan* (1889) 11 All. 460, 16 I. A. 205; *Mahomed* v. *Cooverbai*, 6 Bom. L. R. 1043; *Mohib Ullah* v. *Abdul Khalik* (1908) 30 All. 250; *Abdul Aziz* v. *Fateh Mahomed* (1911) 38 Cal. 518, 9 I. C. 635.

(b) A Mahomedan female dies leaving a mother, a son and a daughter as her only heirs. The mother may make a valid gift of her undivided share in the inheritance to the son, or to the daughter, or jointly to the son and daughter: *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, 701, 15 I. A. 81.

(c) *A*, *B* and *C* are co-sharers in a certain zemindari. Each share is separately assessed by the Government, and has a separate number in the Collector's books, and the proprietor of each share is entitled to collect a definite share of rents from the ryots. *A* makes a gift of his share to *Z without* a partition of the zemindari. The gift is valid, for it is not a gift strictly of a *mushaa*, the share being *definite* and marked off from the rest of the property: *Ameeroonissa* v. *Abadoonissa* (1875) 15 B. L. R. 67, 2 I. A. 87; *Abdul Aziz* v. *Fateh Mahomed* (1911) 38 Cal. 518, 9 I. C. 635; *Jiwan* v. *Imtiaz* (1878) 2 All. 93; *Kasim* v. *Sharif-un-Nissa* (1883) 5 All. 285.

(d) *A*, who owns a house in Rangoon, makes a gift of a third of the house to *B*. The gift is valid, the property being situated in a large commercial town: *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1, 34 I. A. 167.

(e) *A*, a partner in a firm, makes a gift of his share of the partnership assets to *B*. The gift is not valid unless the share is divided off and handed over to *B*: *Hedaya* 483; *Baillie*, 529-530.]

Hed., 483-484; *Baillie*, 523-530. "A gift of part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of part of an indivisible thing is valid," the reason being that.

(*d*) *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1, 34 I. A. 167.

the thing being indivisible, a complete seisin is altogether impracticable, and hence an incomplete seisin must necessarily suffice, since this is all that the thing admits of: *Hed.*, 483.

The term *mushaa* is derived from *shuyuu*, which signifies confusion. An undivided share is called *mushaa*, because of the confusion that might likely arise in the enjoyment of the property if a gift were made of an undivided share in the property by one co-sharer to a *stranger*. No such confusion can arise, if the gift is by one co-sharer to another *co-sharer*. Hence the rule of the Hanafi law that when property held by several co-sharers is capable of partition, the gift of an undivided share in that property in favour of a *stranger* does not take effect until the share is divided off from the rest of the property, and possession thereof is delivered to the donee. "Seisin in cases of gift is expressly ordained, and consequently a complete seisin is a necessary condition:" *Hed.*, 483.

In *Muhammad Mumtaz* v. *Zubaida Jan*, upon which illustration (a) is based, their Lordships of the Privy Council said: "The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." This principle was applied by their Lordships of the Privy Council in the case cited in ill. (d).

In a Madras case (*e*), Benson, J., observed that the doctrine of *mushaa* did not apply in the Madras Presidency, but it was held in a later case that that view was erroneous (*f*).

The rule laid down in this section applies to gifts and not to transfers for consideration (*g*).

Shiah law.—A gift of an undivided share is valid, though it be a share in property capable of partition (*h*): *Baillie*, Part II, 204.

135. Gift to two or more donees.—A gift of property which is capable of partition to two or more persons jointly is invalid, but it may be rendered valid by subsequent possession on the part of each donee of a specific portion of the property. This rule does not apply to the case mentioned in the third exception to s. 134 (*i*), nor, it is conceived to the cases mentioned in the other exceptions.

[*A* makes a gift of a house to *B* and *C* without making any division of the property at the time of the gift. Subsequently *B* and *C* divide the property, and each takes possession of a specific portion. The gift becomes valid by subsequent division and possession.]

Hed., 485; *Baillie*, 524.

Shiah law.—Under the Shiah law a gift of property to two or more donees is valid, though no division is made either at the time of the gift or subsequently: *Baillie*, Part II, 205.

(*e*) *Alabi Koya* v. *Mussa Koya* (1901) 24 Mad. 513.

(*f*) *Vahazulah* v. *Boyapati* (1907) 30 Mad. 519.

(*g*) *Ashidbai* v. *Abdulla* (1906) 31 Bom. 271.

(*h*) *Sadik Husain* v. *Hashim Ali* (1916) 43 I. A. 212, 221-222, 38 All. 627, 646. 36 I. C. 104.

(*i*) *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1, 34 I. A. 167

136. Gift in futuro.—A gift cannot be made of anything to be performed *in futuro* [ills. (a) and (b)], nor can it be made to take effect at any future period whether definite [ill. (c)] or indefinite.

[(a) *A* makes a gift to *B* of 'the fruit that may be produced by his palm tree this year.' The gift is void as being a gift of future property : *Baillie*, 516.

Note.—It is assumed in ill. (a) that the palm tree belongs to *A* ; hence *A* cannot make a gift of the fruits that may be produced without at the same time making a gift of the tree, and this explains ill. (b), assuming that at the Jaghir village in that case was alienable and divisible. But if the tree does not belong to *A*, and all that he is entitled to is the right to receive the fruits when produced, there is not the slightest reason why *A* cannot make a valid gift of the *right*, and this explains ill. (d).

(b) A Mahomedan executes a deed in favour of his wife purporting to give to the wife and her heirs in perpetuity Rs. 4,000 every year out of his share of the income of certain Jaghir villages. The gift is void, as being a gift of a portion of the *future* revenue of the villages : *Amtul Nissa* v. *Mir Nurruddin* (1896) 22 Bom. 489. If the Jaghir be alienable and partible, the gift should be of the donor's *share in the village* and not merely *his share of the income*. But if the Jaghir be not alienable or partible, and all that the donor is entitled to is a specified share of the *income*, the donor, it is submitted, may make a valid gift of his share of the income. See ill. (d) below and the note to ill. (a) above

(c) *A* executes a deed of gift in favour of *B*, containing the words "so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to any one, but after my death, you will be the owner." The gift is void, for it is not accompanied by delivery of possession and it is not to operate *until after* the death of *A* : *Yusuf Ali* v *Collector of Tipperah* (1882) 9 Cal. 138. See also *Chekkene Kutti* v. *Ahmed* (1886) 10 Mad. 196, at p. 199.

(d) *A* is entitled to receive a specified share in the offerings made by pilgrims at a certain shrine. *A* may make a valid gift of the right to receive such share. Here the thing gifted is "the *right* of the donor to receive a fixed share in the offerings after they have been made" (see s. 122) : *Ahmad-ud-Din* v. *Ilahi Bakhsh* (1912) 34 All. 465, 14 I. C. 587 ; *Anwari Begum* v. *Nizam-ud-Din Shah* (1896) 21 All. 165, at pp. 170-171. See note to ill. (a) above]

Macnaghten, p. 50, ss. 3 and 5 ; *Baillie*, 516 ; *Chekkone Kutti* v. *Ahmed* (1887) 10 Mad. 196, 199 [future *indefinite* period]. The rule set forth in this section is based on the principle that the object of the gift must be in existence at the time of the gift : *Baillie*, 516.

137. Contingent gift.—A gift cannot be made to take effect on the happening of a contingency (*j*).

"A gift must not be dependent on anything contingent, as the entrance of Zeyd, or the arrival of Khalid" [*Baillie*, 515-516, 549-550]. A gift by a Shiah Mahomedan to *A* for his life, and, *in the event* of the death of *A* without leaving male issue, to *B*, is as regards *B* a contingent gift, and therefore void (*k*). In a Privy Council case a gift was made by a Shiah Mahomedan to his wife for life and after her death to such

(*j*) Macnaghten, p. 50, s. 3 ; Baillie, 515-516; *Abdul Karim* v. *Abdul Kayum* (1906) 28 All. 342, 345.

(*k*) *Casamally* v. *Currimbhai* (1911) 36 Bom. 214, 257- 258, 12 I. C. 225.

of his children *as may be living at his death*. Their Lordships observed that the gift to the children was contingent, but they refrained from expressing any opinion as to its validity (*l*).

As to alternative bequests, see s. 108 A.

138. Gift with a condition.—When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void and the gift will take effect as if no condition were attached to it.

[(a) **Life-estate.**—*A* makes a gift of a house to *B* during the life of *B*. The condition that *A* shall have the house *for life* is void, and he takes an absolute interest in the property as if no condition were attached to the gift. "An *Amree* [gift for life] is nothing but a gift and a condition, and the condition is invalid": *Hedaya*, 489. "Neither gifts nor charities are affected by being accompanied with an invalid condition, because the Prophet approved of *Amrees* [gifts for life], but held the condition annexed to them by the grantor to be void": *Hedaya*, 488; *Baillie*, 517.

Under the Hanafi law a grantee of a life-estate takes an absolute estate (*m*). The same rule applies to a testamentary gift; thus a *bequest* to *A* for life operates as an absolute bequest of the property to *A* (*n*). The creation of a life-interest is allowed by the Shiah law (*o*); and so also, it would seem, by the Shaffei law (*p*). See s. 44 above.

(b) *A* makes a gift of Government promissory notes to *B*, on condition that *B* should return a *fourth part of the notes* to *A* after a month. The condition is void and *B* takes an absolute interest in the notes: see *Baillie*, 547, Hed. 488. [Here the condition relates to the *return* of a part of the *corpus*.)

(c) *A* makes a gift of his mansion to *B* on condition that he shall not sell it, or that he shall sell it to a particular individual, or that *B* shall give *some part of it* in *iwaz* or exchange. The condition is void, and *B* takes an absolute estate in the mansion: *Baillie*, 547; *Moulvi Muhammad* v *Fatima Bibi* (1886) 12 I. A 159. See s. 139.

(d) *A* makes a gift of certain property to *B*. It is provided by the deed of gift that *B* shall not transfer the property. The restraint against alienation is void, and *B* takes the property absolutely: *Babu Lal* v *Ghansham Das* (1922) 44 All. 633, ('22) A. A. 205, 70 I. C. 84. See Transfer of Property Act, 1882, s 10.]

Hed., 488-489, *Baillie*, 546-549. "When one has made a gift and stipulated for a condition that is *fásid* or invalid, the gift is valid and the condition void": *Baillie*, 546. In the illustrations to the section, the condition is *fásid*. The condition in the illustrations to s. 139 has been held not to be *fásid*.

Life-estates may be created by a wakf.—See s. 160 below.

139. Condition in the nature of a trust.—Where property is transferred by way of gift, and the donor does not reserve the dominion over the *corpus* of the property nor any share of dominion over the *corpus*, but stipulates simply for and obtains a right to the *recurring income* during his life, the gift

(*l*) *Sadik Husain* v *Hashim Ali* (1916) 43 I. A. 212, 219-220, 38 All 627, 643-644, 36 I C. 104

(*m*) *Nizamudin* v *Abdul Gafur* (1888) 13 Bom 264, 275 affirmed on appeal to P. C. sub-nomine, *Abdul Gafur* v *Nizamudin* (1892) 17 Bom 1, 5, 19 I. A. 170, 178 [as to the last decision, see *Mahomed Ibrahim* v *Abdul Latif* (1913) 37 Bom. 447, 458. 17 I. C. 689 *Abdoola* v *Mahomed* (1905) 7 Bom L R 306, *Mahomed Shah* v. *Official Trustee of Bengal* (1909) 36 Cal. 431. 2 I. C. 292, *Suleman* v *Dorab Ali* (1882) 8 I. A. 117, 122

(*n*) *Abdul Karim* v. *Abdul Qayum* (1906) 28 All. 342.

(*o*) *Banoo Begum* v *Mir Abed Ali* (1908) 32 Bom. 172.

(*p*) *Mahomed Ibrahim* v *Abdul Latif* (1913) 37 Bom 447, 458, 17 I. C. 689.

and the stipulation are both valid. Such a stipulation is not void, as it does not provide for a return of any part of the *corpus* as in s. 138, ills. (b) and (c). The stipulation may also be enforced as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated. It was so held by the Judicial Committee of the Privy Council in *Nawab Umjad Ally* v. *Mohumdee Begam* (q) [ill. (a)] which was a Shiah case and in *Mohammad* v. *Fakhr Jahan* (r) which was a Sunni case.

The principle of the above decision has been extended by the Indian Courts to cases in which the gift was made subject to the condition that the donee shall pay the income to a person or persons nominated by the donor during the life of such person or persons [ills. (b) and (c)].

[(a) A transfers and endorses Government promissory notes into the name of his son B, and delivers them to B as a gift, with a condition that B should pay the income thereof to A during his life. Both the gift and the condition are valid, and B is bound to pay the income to A during A's life: *Nawab Umjad Ally* v. *Mohumdee Begam* (1867) 11 M. I. A. 517, 547 548, a Shiah case. The same principle applies to a gift by a Sunni Mahomedan: *Mohammad* v. *Fakhr Jahan* (1922) 49 I. A. 195, 44 All 301, 68 I C. 254, ('22) A P C 281.

(b) A makes a gift of his house to his son B with a condition that B should give the income of one third of the house to A's grandson C during C's life. Both the gift and the condition are valid, and B is bound to pay the income to C during C's lifetime: *Lali Jan* v. *Muhammad* (1912) 34 All 478, 16 I C 105, a Sunni case.

(c) A makes a gift of certain property to her son B with a condition that B should pay out of the income thereof Rs 40 every year to C during C's life, and divide the remaining income equally between him (B) and D during D's life. Both the gift and the condition are valid, and B is bound to pay Rs 40 per annum to C and divide the remaining income equally between himself and D until D's death: *Taiakalbhai* v. *Imatiyaj Begam* (1916) 41 Bom 372, 39 I C 96, a Sunni case.]

The transaction in each of the above illustrations is in substance a *hiba ba shart-ul iwaz*, as to which see s. 142 below.

140. Revocation of gifts.—A gift may be revoked by the donor at any time before delivery of possession. The reason is that *before* delivery there is no complete gift at all.

A gift may be revoked [Expln. II] even after delivery of possession, except in the following cases :—

(1) when the gift is made by a husband to his wife or by a wife to her husband;

(2) when the donee is related to the donor within the prohibited degrees;

(3) when the donee is dead;

(q) (1867) 11 M. I A 517, 547-548.

(r) (1922) 49 I.A. 195, 208-210, 44 All 301, 314-316, 68 I C 254 ('22) A P C 281.

(4) when the thing given has passed out of the donee's possession by sale (s), gift or otherwise ;

(5) when the thing given is lost or destroyed ;

(6) when the thing given has increased in value, whatever be the cause of the increase (s) ;

(7) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding (t) ;

(8) when the donor has received something in exchange (*ewaz*) for the gift [see ss. 140 and 141].

Explanation I.—A gift may be revoked by the donor, but not by his heirs after his death.

Explanation II.—Once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift. Until a *decree* is passed, the donee is entitled to use and dispose of the subject of the gift.

Hed. 485 : *Baillie*, 533-537. The reason why a gift to a person other than a husband or wife or to a person other than one related within the prohibited degrees, may be revoked is thus stated in the Hedaya, p. 486 : "The object of a gift to a *stranger* is a return ;—for it is a custom to send presents to a person of high rank that he may protect the donor ; to a person of inferior rank that the donor may obtain his services ; and to a person of equal rank that he may obtain an equivalent ;—and such being the case, it follows that the donor has power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment."

A gift made in favour of any of the persons mentioned in cls. (1) and (2) of this section cannot be revoked at all, not even if the donor has expressly reserved to himself a right of revocation. In all other cases a gift is revocable, unless the power of revocation has come to an end by the happening of any of the events mentioned in cls. (3) to (8). If no such event has happened, the donor may revoke the gift, even though he may have declared that he would not revoke it. The reason is that, except in the cases mentioned in cls. (1) and 2 the power of revocation is inherent in the donor of every gift (u). Contrast sec. 126 of the Transfer of Property Act, 1882, which does not apply to Mahomedan gifts.

Shiah-law.—The Shiah law differs from the Hanafi law in the following particulars :—

(a) a gift to any blood relation, *whether within the prohibited degrees or not*, is irrevocable after delivery of possession ;

(b) a gift by a husband to his wife, or by a wife to her husband, is, according to the better opinion, *revocable* (Baillie, Part II, 205-206).

(s) *Wali Bandi* v. *Tabeya* (1919) 41 All. 534, 50 I. C. 919 ; *Maulani* v. *Maula Bakhsh* (1924) 46 All. 260, 78 I.C. 222, ('24) A A. 307.

(t) *Maqbul* v. *Ghafur-un-nissa* (1914) 36 All. 333, 24 I. C. 34.

(u) *Cassamally* v. *Currimbhai* (1911) 36 Bom. 214, 255-256, 12 I. C. 225.

(c) a gift may be revoked *by a mere declaration* on the part of the donor without any proceedings in Court [Baillie, Part II, p. 205, f.n. (10)]

141. Hiba-bil-iwaz (gift for a consideration).—A *hiba-bil-iwaz*, as distinguished from a *hiba* or simple gift, is a gift for a consideration. It resembles a sale in all its incidents (*v*), and delivery of possession is not necessary for its validity (*w*). Two conditions, however, must concur to make the transaction valid, namely, (1) actual payment of consideration (*iwaz*) on the part of the donee, and (2) a bona fide intention on the part of the donor to divest himself in præsenti of the property and to confer it upon the donee. The adequacy of consideration is not material; but whatever its amount, it must be *actually and bona fide* paid (*x*).

[(a) *A* and *B*, two Mahomedan brothers, own certain villages which are held by them as tenants-in-common. *A* dies leaving his brother *B* and a widow *W*. Some time after *A*'s death, *B* executes a deed whereby he grants two of the villages to *W*. Two days after the date of the grant, *but as a part of the same transaction*, *W* executes a writing whereby *in consideration* of the grant to her of the two villages she gives up her claim to her husband's estate in favour of *B*. The transaction is a *hiba-bil iwaz*, and it is valid though no possession may have been delivered: see *Muhammad Faiz* v. *Ghulam Ahmad* (1881) 3 All. 490, 8 I. A. 25.

(b) A Mahomedan executes a deed in favour of his wife whereby he grants certain immoveable property to her *in lieu* of her dower. Possession of the property is not delivered to the wife. The transaction is nevertheless valid as a *hiba-bil-iwaz*: *Muhammad Esuph* v. *Pattamsa Ammal* (1889) 23 Mad. 70.]

Distinction between hiba and hiba-bil-iwaz.—The following are the two main points of distinction between a *hiba* and a *hiba-bil-iwaz*:—

(1) no delivery of possession is necessary to validate a *hiba-bil-iwaz*, as it is to validate a *hiba* or simple gift;

(2) a *hiba-bil-iwaz* once completed is in no case revocable: a *hiba*, though completed by possession, is revocable except in certain cases [s. 140].

Though a transaction may be described in the plaint as a *hiba-bil-iwaz*, it is open to the plaintiff to show that it was in fact a simple *hiba*, provided the point is raised at an early stage of the proceedings (*y*).

Consideration.—It has been held by the High Court of Bombay that whatever is a valid consideration for a contract within the meaning of sec. 2, cl. (d), of the Indian Contract Act, 1872, is a valid consideration also for a *hiba-bil-iwaz*. It has accordingly been held that where a Mahomedan dies leaving two brothers and a daughter, and each of the brothers relinquishes his share in the estate of the deceased in favour of the daughter in consideration of the other doing so, the transaction is a *hiba-bil-iwaz*, the relin-

(*v*) That is the incidents which a sale has in Mahomedan law, of which the most important for our present purposes is that delivery of possession is not necessary to complete it.

(*w*) Macnaghten, pp. 51-52, ss. 14 and 15.

(*x*) *Khajooroonissa* v. *Rowshaw Jahan* (1876) 2 Cal. 184, 3 I. A. 291; *Muhammad Faiz* v. *Ghulam Ahmed* (1881) 3 All. 490, 8 I. A. 25; *Chaudhri Medhi Hasan* v. *Muhammad Hasan* (1906) 28 All. 439, 33 I. A. 68; *Mohanlal* v. *Mahmud* (1922) 44 All. 580, 67 I. C. 671 ('22) A.A. 347.

(*y*) *Serajuddin* v. *Isab* (1922) 49 Cal. 161, ('22) A.C. 258, 70 I. C. 203.

quishment by each being consideration for relinquishment by the other, and no delivery of possession to the daughter is necessary to validate the transaction (z).

A gift "in consideration of your being my cousin" is not a gift for a consideration or a *hiba-bil-iwaz*. Such a transaction is a *hiba* or gift simple, and delivery of possession is necessary to validate the gift (a). Similarly a gift "for having with cordial affection and love rendered service to me, and maintained and treated me with kindness and indulgence, and shown all sorts of favour to me," is a *hiba* or gift, simple. Such a transaction is not a *hiba-bil iwaz*, there being no *iwaz* or consideration, and delivery of possession is necessary to validate the gift (b).

Adequacy of consideration.—In *Khajooroonissa* v. *Rowshan Jehan* (c) which is the leading case on the subject, their Lordships of the Privy Council said: "Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far to say that even a gift of a ring may be a sufficient consideration: but whatever its amount, it must be actually and *bona fide* paid." It would seem to follow from this that however small the consideration for a *hiba-bil-iwaz* may be, the transaction would be valid, if the consideration was actually and *bona fide* paid. But a different view was taken by the High Court of Bombay in a case in which the consideration for a grant was Rs. 10. No attempt was made to ascertain whether the amount was actually and *bona fide* paid, and the Court came to the conclusion from the mere fact that the consideration was only Rs. 10 that the transaction could not be sustained as a *hiba-bil-iwaz* (d). It is submitted, with great respect, that this view of the law is erroneous. In fact, it has been held that even a copy of the Koran is a good consideration for *hiba-bil-iwaz* (e)

Intention to transfer in præsenti.—Where property was transferred to a donee *subject to* a reservation of the possession and enjoyment to the donor and his wife during their lives, it was held by their Lordships of the Privy Council that there was no intention on the part of the donor to divest himself *in præsenti* of the property, and that the transaction could not therefore be upheld as a *hiba-bil-iwaz* (f)

Whether a hiba-bil-iwaz of immoveable property is a sale within the meaning of sec. 54 of the Transfer of Property Act?—It has been recently held by the High Court of Calcutta that it is, so that if the property is of the value of Rs. 100 and upwards, the transaction must be effected by a registered instrument, and if it is a value less than Rs. 100, it must be effected by a registered instrument or by delivery of property (g): In an earlier case, the same Court said: "Such a transaction is different to an out-and-out sale, and it is also different to a gift. It partakes of the character of both" (h).

Two kinds of Hiba-bil-iwaz.—"The fundamental conception of a *Hiba-bil-iwaz*, [gift with exchange] in Mahomedan law is that it is a transaction made of *two distinct acts of donation*, that is, it is transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other" (i). Thus if *A* makes a *hiba* or gift of a ring to *B*, and *B* subsequently makes

(z) *Muhammadunissa* v. *Bachelor* (1905) 29 Bom. 428; *Ashidbai* v. *Abdulla* (1906) 31 Bom. 271.

(a) *Jafar Ali* v. *Ahmed* (1868) 5 Bom. H. C., A. C. 37.

(b) *Rahim Bakhsh* v. *Muhammad Hasan* (1881) 11 All. 1

(c) (1876) 2 Cal. 184, 197, 3 I. A. 291.

(d) *Rujabai* v. *Ismail* (1870) 7 Bom. H. C., O. C. 27, 30.

(e) *Abbas Ali* v. *Karim Baksh* (1909) 13 Cal. W. N. 160, 4 I. C. 466

(f) *Chaudhari Medhi Hasan* v. *Muhammad Hasan* (1906) 28 All 439, 453, 33 I. A. 68 (It was also found that no consideration passed from the donee to the donor); *Moosa Adam Patel* v. *Ismail Moosa* (1909) 12 Bom. L.R. 169, 194, 5 I. C. 946.

(g) *Abbas Ali* v. *Karim Baksh* (1909) 13 Cal. W.N. 160, 4 I. C. 466.

(h) *Solah Bibee* v. *Keerum Bibee* (1871) 16 W. R. 175, at p. 176.

(i) Per Mahmood, J., in *Rahim Baksh* v. *Muhammad Hasan* (1888) 11 All. 1, at p. 5.

a gift of a watch to A telling A that it is the *iwaz* or return for the gift of the ring, the transaction is a *hiba-bil-iwaz* as defined in the older Mahomedan law-books, and neither A nor B can revoke his gift. But if B makes the gift to A without intimating to A that it is the *iwaz* or return for his gift, the transaction does not amount to a *hiba-bil-iwaz*, and either party may revoke his gift, unless, of course, the case falls within one of the exceptions in sec. 140 above. It will thus be seen that a *hiba-bil-iwaz* as understood by the older jurists consists of two distinct acts, first, the original gift, called *hiba*, and, secondly, the return, called *iwaz*. Both the *hiba* and the *iwaz* must comply with all the requirements of a gift, namely, delivery of possession, and so forth ; the transaction is neither a contract of sale nor exchange either in its inception or completion (*j*).

Such is the conception of a *hiba-bil-iwaz* as defined by the older jurists. But the expression *hiba-bil-iwaz* has acquired a different meaning in India. In the *hiba-bil-iwaz* of India there is *only one act*, namely, the *hiba*, and the *iwaz* is the consideration for the *hiba*. Such a transaction is not a *hiba-bil-iwaz* as defined by the older jurists, but it resembles a sale and has all the incidents of the latter contract ; that is to say, *possession is not necessary to complete the transfer*, and even an undivided share (*mushaa*) in property capable of division may be lawfully transferred by it (*k*). The *hiba-bil-iwaz* as defined in the present section is the *hiba-bil-iwaz* of India. It may be, as observed by Mahmood, J., that the term *hiba-bil-iwaz* is misused by Indian Mahomedans (*l*). But the term has acquired a special meaning in India and it is applied to a gift *for a consideration*, the element of a "return gift" being completely absent from the transaction.

The position then is this We have two distinct transactions both of which go by the same name We have the *hiba-bil-iwaz* as defined by the older jurists of which the essence is a return gift And we have the *hiba-bil-iwaz* of India of which the essence is consideration The validity of each of these transactions is governed by distinct rules. In the case of *hiba-bil iwaz* as understood by the older jurists, delivery of possession is necessary both as regards the original and the return gift. *But no delivery of possession is necessary in the case of the hiba bil-iwaz of India.* It is clear from what is stated above that a person to whom a gift is made but the gift has not been perfected by possession would attempt to support the transaction as a *hiba-bil-iwaz in the Indian form*, and the Court has then to consider whether the conditions laid down in the present section as to *bona fide* intention and consideration are satisfied. Let us explain this by an illustration .

A has three sons and a grandson *B* by a predeceased son. Being anxious to provide for *B*, *A* transfers certain property of the value of Rs. 5,000 to *B* in consideration of Rs. 10 received from *B*. No delivery of possession is made to *B*. It is proved that *B* actually paid Rs. 10 to *A*. It is also proved that *A* had a *bona fide* intention to divest himself *in præsenti* of the property, and to confer it upon *B*. Is the transfer valid ?

The transfer is certainly not a *hiba-bil-iwaz* as defined by the older jurists : there is no original gift and no return gift. But it is a *hiba-bil-iwaz* in the Indian form, and applying the test laid down in the present section, being that laid down by the Privy Council in the cases on which the present section is based, the transfer is perfectly valid *though possession was not delivered to B*. You cannot ignore this transaction and say, "We refuse to recognise it as legal, because the older jurists had no conception of such a transaction." Such a transaction is recognised in India as a gift for a consideration ; it is known as the *hiba-bil-iwaz* of India ; it has got certain legal incidents of its own

(*j*) Baillie, 543.
(*k*) Baillie, 122-123 ; Macnaghten, p. 52, s 15.
(*l*) *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1, at p 7.

and it forms part of the Anglo-Mahomedan law of India. It is not therefore correct to test the validity of such a transaction, as a learned author would have us do (m), by rules which apply exclusively to the *hiba-bil-iwaz* as defined in the older law-books. Even Mahmood, J., did not go that length in *Rahim Bakhsh* v. *Mahammad Hasam* (n), but he tested the validity of the transaction in question, first, by considering whether it complied with the conditions of a *hiba-bil-iwaz* as defined in the old law-books, and, next, whether it complied with the requisites of a *hiba-bil-iwaz* in the Indian form. Nor is a transaction of the kind mentioned in the above illustration in any sense a sale, so as to attract the application of s. 54 of the Transfer of Property Act (o). The only connection which it has with a sale is that it *resembles* a sale in its *incidents*; that is to say, as in the case of a Mahomedan sale, so in the case of the *hiba-bil-iwaz* of India, delivery of possession is not necessary nor is the transaction invalid on the ground of *mushaa*.

142. Hiba-ba-shart-ul-iwaz.—Where a gift is made *with a stipulation* (*shart*) for a return, it is called *hiba-ba-shart-ul-iwaz*. As in the case of *hiba* (simple gift), so in the case of *hiba-ba-shart-ul-iwaz*, delivery of possession is necessary to make the gift valid, and the gift is also revocable [s. 140]. But the gift becomes irrevocable on delivery by the donee of the *Iwaz* (return) to the donor (p).

The main distinction between the *hiba-bil-iwaz* of India and *hiba-ba-shart-ul-iwaz* is that delivery of possession is not necessary in the former case, while it is necessary in the latter case.

The main distinction between *hiba-bil-iwaz* as defined in the older Mahomedan law books and *hiba-ba-shart-ul-iwaz* is that in the former case the *Iwaz* proceeds *voluntarily* from the donee of the gift, while in the latter case it is expressly *stipulated for* between the parties. The former bears the character of a gift throughout and does not partake of the character of a sale either in its inception or completion, while as regards the latter, it is a gift in its first stage, but it partakes of the character of a sale after possession has been taken by the donee of the thing given and by the donor of the *Iwaz*, so that the transaction, when completed, is exposed to *shufa* or pre-emption, and either party may return the thing delivered to him for a defect. These two incidents, namely, the right of pre-emption, and the right to return a thing for a defect, are two of the incidents of the contract of sale in the Mahomedan law. As *hiba-ba-shart-ul-iwaz* is not common in India, it is useless to pursue the matter further. As to the incidents of sale in Mahomedan law, the student is referred to Baillie's Digest, 2nd ed., Introduction to the Chapter on Sale, pp. 775-783.

143. Areeat.—The grant of a license, resumable at the grantor's option, to take and enjoy the usufruct of a thing, is called *Areeat* (q).

(m) Tyabji's "Principles of Muhammadan Law," pp. 474-475.

(n) (1888) 11 All. 1, 6-7.

(o) See per Beaman, J., in *Moosa Adam Patel* v. *Ismail* (1909) 12 Bom. L. R. 169, at p. 185, 5 I. C. 946.

(p) Baillie, 543-544; Hedaya, 488; *Mogulsha* v. *Mahamad Saheb* (1887) 11 Bom. 517 [having regard to the decision that possession was necessary, the transaction is wrongly described in the judgment as *hiba-bil-iwaz*].

(q) *Muhammad Faiz* v. *Ghulam Ahmad* (1881) 3 All. 490, 8 I. A. 25; *Mumtaz-un-Nissa* v. *Tufail* (1906) 28 All. 264, as explained in *Khalil Ahmed. In the matter of* (1908) 30 All. 309. Hedaya, p. 478.

A *hiba* is a transfer of *ownership* without consideration. A *hiba-bil-iwaz* is a transfer of *ownership* for a consideration. An *areeat* is not a transfer of *ownership*, but a temporary license to enjoy the profits so long as the grantor pleases. A *hiba* is revocable except in certain cases (s. 140). A *hiba-bil-iwaz* is not revocable in any case. An *areeat* is revocable in every case.

144. Sadakah.—A *Sadakah* is a gift made with the object of acquiring religious merit. Like *hiba*, it is not valid unless accompanied by delivery of possession; nor is it valid if it consists of an undivided share in property capable of division [s. 134]. But unlike *hiba*, a *sadakah*, once completed by delivery, is not revocable; nor is it invalid, because it is made to two or more persons jointly, provided the donees are poor persons [s. 135].

Baillie, 554-556; *Hed.*, 489. The distinction between *hiba* and *sadakah* lies in the object with which it is made. In the case of *hiba*, the object is to manifest affection towards the donee, or to win his regard or esteem; in the case of *sadakah*, the object is "to acquire merit in the sight of the Lord." A gift, it is said, may amount to a *sadakah*, even if it be made to rich relations, provided the object is to acquire religious merit. But it is doubtful whether the Courts would enter upon any inquiry as to the *motive* with which a gift is made. It is therefore best to describe a *sadakah* as a gift for a religious, pious or charitable purpose.

145. Marumakkattayam Law.—Where a gift is made by a Mahomedan husband governed by the makattayam law to his wife who is governed by the marumakkattayam law and to her children, the property becomes the exclusive property of the donees with the incidents of tarwad property subject to marumakkattayam law, and on the death of the wife it does not pass to her heirs under the Mahomedan law (*r*).

(*r*) *Pattatheruvatt* v *Mannamkunnyil* (1908) 31 Mad 228.

CHAPTER XII.

WAKFS.

146. Wakf defined.—Wakf, as defined in the Wakf Act, [s. 2, cl. (1)], means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable.

The term wakf literally means *detention*. In the language of law it signifies the extinction of the appropriator's ownership in the thing dedicated and the *detention* of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied for the benefit of mankind (Baillie, 558). In the following sections we have used sometimes the word "endowment" and sometimes "appropriation" as the English equivalent of wakf. See Hedaya, 231, 234

"*Any property.*"—The above is the definition of "wakf" as given in the Mussalman Wakf Validating Act VI of 1913. It is clear from that definition that a wakf may be created of *any* property, whether it be moveable or immoveable. Before the said Act it was settled law that a wakf may be made of immoveable property, but it was not settled whether a wakf may be made of moveable property. According to the Calcutta, Bombay and Madras High Courts, a wakf cannot be made of moveable property, unless the moveable was accessory to immoveable property, as for instance it was cattle attached to agricultural land or unless the wakf of a moveable was allowed by custom (*s*). On the other hand, according to the Allahabad High Court, a wakf could be created of moveable property, *e.g.*, coins or shares in a company (*t*). This distinction is still important, for it has been held that the Wakf Act is not retrospective, in other words, it does not apply to wakf created before the said Act came into force, that is, 7th March 1913 [see s. 160 below].

Wakf of mortgaged property.—The existence of a mortgage at the time of creation of *wakf* does not render the *wakf* invalid (*u*). See s. 123 above.

"*Permanent dedication.*"—A Mahomedan conveys immoveable property to trustees upon trust out of the income thereof to feed the poor for a period of five years, and to reconvey the property to him at the end of five years. This is not a valid wakf for the appropriation is not permanent, but for a limited period only: Baillie, 565.

Religious, pious or charitable purpose.—The following are instances of religious, pious or charitable objects:—

(1) providing an imam for a mosque (*v*);

(2) providing a professor for a college (*v*);

(*s*) *Kulsom Bibee* v. *Goolam Hoosein* (1905) 10 Cal. W. N. 449; *Fatmabai* v. *Gulam Husen* (1907) 9 Bom. L. R. 1337; *Kadir Ibrahim* v. *Mahomed* (1909) 33 Mad. 118, 4 I. C. 136.

(*t*) *Abu Sayid* v. *Bakur Ali* (1901) 24 All. 190.

(*u*) *Shahazadi* v. *Khaja Hossain* (1869) 12 W. R. 498; *Janjira* v. *Mahommad* (1922) 49 Cal. 477, 483, 67 I. C. 77, ('22) A. C. 429.

(*v*) Baillie, 574.

(3) celebrating the birth of Ali Murtaza (*w*);

(4) keeping tazias in the month of Muharram (*w*);

(5) repairs of *imambaras* (*w*);

(6) celebrating the death anniversaries (*barsi*) of the settlor and of the members of his family (*w*);

(7) performance of ceremonies known as *kadam sharif* (*x*);

(8) burning lamps in a mosque (*y*);

(9) reading the Koran in public places, or even at private houses (*y*);

(10) The performance of the annual *fateha* of the settlor and of the members of his family (*z*). [The ceremony of *fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied with distribution of alms to the poor.]

The following objects have been held to be neither religious nor charitable :—

(1) maintaining a private tomb, as distinguished from the tomb of a saint (*a*).

(2) reading the Koran at tombs or graves (*b*);

[Mr. Ameer Ali is of opinion that both these objects are valid; see his Mahomedan Law, Vol. I, p. 389.]

Whether the objects of wakf must be certain.—According to the English law the objects of a trust, whether public or private, should be certain, otherwise the trust is void for uncertainty. The leading English case on public trusts is *Morice* v. *The Bishop of Durham* (*c*). In that case it was held by Lord Eldon that a bequest for "such objects of benevolence or liberality as the executor should most approve of " was too vague to be enforced. It has similarly been held that a trust for " charitable or benevolent purposes " (*d*) or for " purposes charitable or philanthropic " (*e*), or for " such charitable or public purposes as my trustee thinks proper " (*f*), is void for uncertainty. Following this principle, it has been held by the Privy Council that a gift by a Hindu to *dharam*, an expression equivalent to " charitable, religious or philanthropic purposes," is void for uncertainty (*g*). In an old Bombay case the High Court expressed the opinion that a bequest by a Khoja Mahomedan to *dharam* is void for uncertainty (*h*). In a recent Punjab case it was held that a wakf for such charitable objects as the trustees should think proper and for such purpose as that the settlor should obtain certain bliss therefrom, was void for uncertainty (*i*). Mr. Ameer Ali is of opinion that the principle of *Morice* v. *The Bishop of Durham* is not applicable to *wakf* (*j*). On the other hand, Sir Roland Wilson is of opinion that that principle does apply to

(*w*) *Biba Jan* v. *Kalle Husain* (1909) 31 All. 136, 1 I. C. 763; *Sayid Ismail* v. *Hamedi Begum* (1921) 6 Pat. L. J. 218, 235-236, 62 I. C. 455.

(*x*) *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211.

(*y*) *Mazhar Husein* v. *Abdul* (1911) 33 All. 400, 9 I. C. 753.

(*z*) *Luchmiput Singh* v. *Amir Alum* (1882) 9 Cal. 176; *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211; *Biba Jan* v. *Kalle Husain* (1909) 31 All. 136, 1 I. C. 763; see p. 189 of the report; *Mazhar Husain* v. *Abdul* (1911) 33 All. 400, 9 I. C. 753 [Stanley, C.J., *dubitante*]; *Mutu Ramanadan* v. *Yava Levvai* (1917) 44 I. A. 21, 27, 40 Mad. 116, 122, 39 I. C. 235, See also *Salebhai* v. *Safiabu* (1912) 36 Bom. 111, 12 I. C. 702.

(*a*) *Kaleloola* v. *Nuseerudeen* (1894) 18 Mad. 201; *Zooleka Bibi* v. *Syed Zynul Abedian* (1904) 6 Bom. L. R. 1058.

(*b*) *Kaleloola* v. *Nuseerudeen* (1894) 18 Mad. 201.

(*c*) (1804) 10 Ves. 522.

(*d*) *In re Riland* (1881) W. N. 173.

(*e*) *In re Macduff* (1896) 2 Ch. 463.

(*f*) *Blair* v. *Duncan* [1902] A. C. 37.

(*g*) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I. A. 71.

(*h*) *Gangabai* v. *Thavar* (1863) 1 Bom. H. C., O. C. 71.

(*i*) *Shahab-ud-Din* v. *Sohan Lal* (1907) Punj. Rec. No. 75. See also *Advocate-General* v. *Hormusji* (1905) 29 Bom. 375.

(*j*) Ameer Ali, Vol. I, 325.

wakfs (k). Mr. Tyabji takes the same view as Mr. Ameer Ali (l). The point, however, should not present much difficulty since the passing of the Wakf Act. Wakf as defined in that Act is a dedication for "religious, pious or charitable" purposes recognised by the Mussalman law (see s. 161 below). Whatever purpose, therefore, is "religious, pious or charitable" according to the Mahomedan law, can form the subject-matter of a valid wakf. In a recent Allahabad case it was held that a dedication of a portion of a Mahomedan's property for the reading of *fateha* and for *Umur-i-Khair* (charitable purposes) including the maintenance of his poor relations and dependants, is not void for uncertainty (m). As to the expression "*khayrat*," see the undermentioned case (n).

Personal grant.—A grant may be made for a religious purpose, *e.g.*, for an imambara such a grant is not necessarily wakf. It may be a personal grant to the donee, and his heirs subject to the condition that the income should be used for the imambara (o).

147. Persons capable of making wakfs.—Every Mahomedan of sound mind and not a minor may dedicate his property by way of wakf.

Baillie, 560. See as to majority, notes to s. 101 above.

148. Form of wakf immaterial.—A wakf may be made either verbally or in writing. It is not necessary to constitute a wakf that the word "wakf" should be used in the grant (p).

(Note that the provisions of the Indian Trustees Act II of 1882 do not apply to wakfs, see s. 1 of the Act.)

A wakf may be created by an Indenture of Trust in the English form in which case the legal estate in the wakf property becomes vested in the trustees (q); or the founder of the wakf may simply appoint mutawalis to superintend and manage the wakf property in which case the property does not vest in the mutawalis (r). In the latter case as much as in the former, the mutawalis are entitled to sue for possession of the wakf property in the hands of third parties (s). See s. 163A and notes thereto.

149. Wakf may be testamentary or inter vivos.—A wakf may be created by act inter vivos or by will.

It was held at one time that a Shiah cannot create a wakf by *will*, but it has since been held by the Privy Council that a Shiah may create a wakf by will as well as by an act *inter vivos* (t).

A wakf created by will is not invalid merely because it contains a clause providing that the wakf should not operate if any child should be born to the testator in his life time. The reason is that a testator has the power in law to evoke or modify his will at

(k) Wilson, s. 322, pp. 344-345.
(l) Tyabji, p. 596.
(m) *Mukarram* v. *Anjuman-un-Nissa* (1923) 45 All. 152, 69 I. C. 836, ('24) A.A. 223.
(n) *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 282-284, 31 I. C. 106.
(o) *Muhammad Raza* v. *Yadgar* (1924) 51 I. A. 192, 51 Cal. 446, 80 I. C. 645, ('24) A.P.C. 109.
(p) *Jewan Das* v. *Shah Koobeer-ood-Din* (1840) 2 M. I. A. 390; *Saliq-un-Nissa* v. *Mati Ahmad* (1903) 25 All. 418 [Shiah law]; *Muhammad Hamid* v. *Mian Mahmud* (1923) 50 I. A. 92, 104, 4 Lah. 15, 28, ('22) A.P.C. 384, 77 I. C. 1009.
(q) *Ram Charan* v. *Fatima Begam* (1915) 42 Cal. 933, 938, 27 I. C. 442.
(r) *Muhammad Rustam Ali* v. *Mushtaq Husain* (1920) 47 I. A. 224, 42 All. 609, 57 I. C. 329.
(s) (1920) 47 I. A. 224, 42 All. 609, 57 I. C. 329, *supra*.
(t) *Baqar Ali Khan* v. *Anjuman Ara Begam* (1902) 25 All. 236, 30 I. A. 94.

any time he likes, and he may therefore revoke a wakf created by will even without reserving any express power in that behalf (*u*).

150. Limits of power to dedicate property by way of wakf.—A Mahomedan may dedicate the whole or any part of his property by way of wakf. But a wakf made by will or during *marz-ul-maut* cannot take effect to a larger amount than the bequeathable third without the consent of the heirs.

Hed., 233 ; Baillie, 612. The same is the rule of Shiah law (*v*).

A testamentary wakf is but a *bequest* to charity, and it is therefore governed by the provisions of s. 104 above relating to wills.

151. Delivery of possession and registration.—(*1*) A wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. According to Muhammad, a wakf is not complete, unless, besides a declaration of wakf, a mutawali (superintendent) is appointed by the owner and possession of the endowed property is delivered to him [Hed., 233 ; Baillie, 550]. In *Doe dem Jan Bibi* v. *Abdulla Barber* (*w*), it was held that the opinion of Abu Yusuf prevails in India, and that a mere declaration of wakf by the donor was sufficient to create a wakf. The High Court of Allahabad has held that the opinion of Muhammad is to be followed in preference to that of Abu Yusuf (*x*). The decision in *Doe dem Jan Bibi* was followed by the High Court of Calcutta in a recent case (*y*). It has also been followed by the Rangoon High Court (*z*).

(*2*) The founder of a wakf may constitute himself the first mutawali (superintendent), and where he does so, no transfer of possession is necessary (*a*) [s. 164].

(*3*) Where by a wakfnamah the owner of an immoveable property dedicates the property to God and constitutes himself the first mutawali (superintendent), and reserves to himself the power of appointing mutawalis jointly with him or after his death, but the wakfnamah does not purport to transfer

(*u*) *Muhammad Ashan* v. *Umardaraz* (1906) 28 All. 633 ; *Abdul Karim* v. *Shofiabnissa* (1906) 33 Cal. 853.

(*v*) *Ali Husain* v. *Fazal* (1914) 36 All. 431, 23 I. C. 291.

(*w*) (1838) Fulton, 345.

(*x*) *Muhammad Aziz-ud-din* v. *The Legal Remembrancer* (1893) 15 All. 321 ; *Muhammad Yunus* v. *Muhammad* (1921) 43 All. 487, 62 I. C. 896. See also *Banubai* v. *Narsingrao* (1907) 31 Bom. 250.

(*y*) *Janjira* v. *Mohammad* (1922) 49 Cal. 477, 485-488, 67 I. C. 77, ('22) A. C. 429.

(*z*) *Ma E Khin* v. *Maung Sein* (1924) 2 Rang. 495, ('25) A. R. 71, 88 I. C. 167.

(*a*) *Abdul Rajak* v. *Jimbabai* (1911) 14 Bom. L. R. 295, 300, 14 I. C. 988 ; *Muhammad Rustam Ali* v. *Mushtaq Husain* (1920) 47 I. A. 224, 227, 42 All. 609, 612, 57 I. C. 329 ; *Husseinbhai* v. *Advocate-General of Bombay* (1920) 22 Bom. L. R. 846, 57 I. C. 991 ; *Janjira* v. *Mohammad* (1922) 49 Cal. 477, 488, 67 I. C. 77, ('22) A. C. 429 ; *Abdul Jalil* v. *Obed-ullah* (1922) 43 All. 416, 62 I. C. 725 ; *Muhammad Zain* v. *Nur-ul-Hasan* (1923) 45 All. 682, 74 I. C. 142; *Iafazzal* v. *Majid-ullah* (1924) 5 Lah. 59, 79 I. C. 120, ('24) A. L. 432.

the ownership to trustees as in the case of an English Indenture of Trust, the wakfnamah does not require registration (*b*).

Intention.—Where there is neither a declaration of wakf nor delivery of possession, a *mere intention* to set apart property for charitable purposes is not sufficient to create a wakf, even though it may be followed by actual appropriation, as in the case of a definite sum of money, by applying the interest to the intended purpose (*c*).

If a wakf *inter vivos* is created by a document, and establishes by its terms a religious or charitable trust, evidence is not admissible to show that the settlor had no intention to give effect to the trusts, and that the trusts were not in fact given effect to (*d*). But such evidence is admissible if the wakf is not created by a document (*e*), or, if it is created by a document, the language employed in the document is ambiguous (*f*).

Shiah law.—Under the Shiah law, a wakf *inter vivos* cannot be created by a mere declaration; there must also be delivery of possession: Baillie, Part II, 212.

152. Revocation of wakf.—(*1*) A testamentary wakf, that is, a wakf made by will, may be revoked by the owner at any time before his death (*g*) [s. 149].

A testamentary wakf, being no more than a *bequest* for religious or charitable purposes, may be revoked like any other bequest; see s. 109 above. A wakf created during *marz-ul-maut* stands on the same footing (*h*): see s. 114 above.

(*2*) Where at the time of creating a non-testamentary wakf, the wakif reserves to himself the power of revoking the wakf, the wakf is invalid.

Baillie, 565; *Fatmabai* v. *The Advocate-General of Bombay* (1882) 6 Bom. 42, 51; *Assoobai* v. *Noorbai* (1906) 8 Bom. L. R. 245, 250-251; *Pathukutti* v. *Avathalakutti* (1890) 66, 73-74; *Ashna Bibi* v. *Awaljadi* (1917) 44 Cal. 698, 702, 37 I. C. 887.

(*3*) But it is stated by Mr. Ameer Ali. on the authority of Radd-ul-Mukhtar, that the wakif can, in the case even of a non-testamentary wakf, reserve to himself, at the time of the dedication, the power to alter the beneficiaries of the trust by either adding to their number or excluding some, or to increase or reduce their interest in it [Ameer Ali, vol. 1, 4th ed., p. 426, paragraph headed "Power to alter beneficiaries"]. In other respects a wakf *inter vivos* once completed cannot be altered or revoked.

Hedaya, 231-232; Baillie, 558; *Gulam Hussain* v. *Aji Ajam* (1860) 4 Mad. H. C. 44; *Hidaitoonnissa* v. *Afzul* (1870) 2 N.-W. P. 420 [a Shiah case]; *Abdur Rahim* v. *Narayandas* (1923) 50 I. A. 84, 90, 50 Cal. 329, 335, 71 I. C. 646, ('23) A. P. C. 44.

153. Wakf of mushaa.—A *mushaa* or an undivided share in property may, according to the more approved view,

(*b*) 47 I. A. 324, 42 All. 609, 57 I. C. 329, *supra*.
(*c*) *Ba[illegible]ubi* v. *Narsingrao* (1907) 31 Bom. 250.
(*d*) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 484; *Luckmiput* v. *Amir Alum* (1882) 9 Cal. 176, 181.
(*e*) *Salig Ram* v. *Amjad Khan* (1906) All. W. N. 159; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058, 1067.
(*f*) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. N. N. 449, 484.
(*g*) *Muhammad Ahsan* v. *Umardaraz* (1906) 28 All. 633.
(*h*) *Sayed Abdula Sayad Zain* (1889) 13 Bom. 555, 560.

form the subject of a wakf, whether the property be capable of division or not.

Exception.—The wakf of a *mushaa* for a mosque or for a tomb is not valid.

Hed., 233; Baillie, 573. The approved opinion above referred to is that of Abu Yusuf. According to Muhammad, the wakf of a *mushaa* in property *capable* of partition is not valid, for he holds that delivery of possession by the endower to a *mutawali* is a condition necessary to the validity of a wakf; see s. 151 above. See as to *mushaa*, s. 132-134 above.

154. Contingent wakf not valid.—It is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency.

A Mahomedan wife conveys her property to her husband upon trust to maintain herself and her children out of the income, and to hand over the property to the children on their attaining majority, and in the event of her death without leaving children, to devote the income to certain religious uses. This is not a valid wakf, for it is contingent on the death of the settlor without leaving issue: *Pathukutti* v. *Avathalakutti* (1888) 13 Mad. 66; *Casamally* v. *Currimbhoy* (1911) 36 Bom. 214, 258, 12 I. C. 225. So far as this particular illustration goes, it would be a good wakf under the Wakf Act [see s. 161 below].

Baillie, 564. The same is the rule of Shiah Law: Baillie, Part II, 218; *Syeda Bibi* v. *Mughal Jan* (i).

As to an alternative bequest to charity, see s. 108A above.

155. Maintenance of settlor and payment of his debts.—A wakf is not invalid because it contains a provision for the maintenance and support of the settlor during his lifetime or for the payment of his debts out of the rents and profits of the endowed property [Wakf Act, sec. (3), cl. (b)].

[(a) A Hanafi Mahomedan female conveys her house to her husband upon trust to pay the income of the house to her during her life, and from and after her death to devote the whole of it to certain charitable purposes. This is a valid wakf, though the charitable trust is not to come into effect until after the founder's death: *Hedaya*, 237; *Doe dem Jan Beebee* v. *Abdoolah* (1838) Fulton's Rep. 345; *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42, 51-52; *Cassamally* v. *Sir Currimbhoy* (1912) 36 Bom. 214, 12 I. C. 225; *Muhammad Zain* v. *Nur-ul-Hasan* (1923) 45 All. 682, 74 I. C. 142; *Ma E Khin* v. *Maung Sen* (1924) 2 Rang. 495, 88 I. C. 167, ('25) A. R. 71.

(b) A Hanafi Mahomedan executes a deed of wakf by which he directs that the income of the property dedicated should in the first instance be applied for the payment of his debts, and after the debts are paid, towards certain religious and charitable pur-

(i) (1902) 24 All. 231. The actual decision in this case cannot be supported since the Privy Council ruling in *Baqar Ali Khan* v. *Anjuman Ara Begum* (1902) 25 All. 236, 30 I. A. 94.

poses. This is a valid wakf, though the charitable trust is not to come into operation until after all the debts have been paid: *Luchmiput* v. *Amir Alum* (1882) 9 Cal. 176; *Janjira* v. *Mohammad* (1922) 49 Cal. 477, 483, 67 I. C. 77, ('22) A. C. 429 [a case under the Wakf Act]. Such a wakf is not valid under the Shiah Law: see below "Shiah law."]

Life-interest for settlor.—Note that a Sunni Hanafi Mussalman may reserve a life-interest for himself by the deed of wakf. He may also provide for the payment of his debts out of the income of the wakf property. A Shiah Mussalman cannot do either of these. See below "Shiah law."

Shiah law.—According to the Sunni law, the settlor may reserve the usufruct the endowed property for himself for his life. According to the Shiah law a wakf is not valid unless the settlor divests himself of the property from the date of the creation of the wakf (*j*). Hence a settlor according to that law cannot reserve any portion of the income of the wakf property to *himself* during his life. If he reserves the whole income to himself, the wakf is wholly invalid. If he reserves a portion of the income, say, one-third, the wakf is invalid as to one-third of the corpus, but valid as to the remaining two-thirds (*k*). But he may create a life-interest in favour of *another person*, *e.g.*, his wife (*l*).

Again, according to the Shiah law, a wakf is not valid, if it provides for the payment of the settlor's debts. The reason is that according to that law the settlor should divest himself of all interest in the property dedicated, and reserve nothing for himself either directly or indirectly (*m*): Baillie, Part II, 219.

Wakf Act.—The present section is practically a reproduction of s. 3, cl. (b) of the Wakf Act. That section applies to Hanafi Sunnis only. It does not apply to Sunnis of other sects, nor does it apply to Shiahs.

156. Wakf by immemorial user.—When land has been used from time immemorial for a religious purpose, *e.g.*, for the purpose of a burial ground, then the land is by user wakf, though there may be no evidence to show when or how it was originally set apart for that purpose (*n*).

157. Wakf property cannot be alienated or attached.—When property is dedicated by way of wakf, the ownership is deemed to be transferred from the dedicator to the Almighty, and all proprietary rights of men are thenceforth extinguished in the property (*o*). The property therefore cannot be alienated (*p*) except in the cases mentioned in secs. 168 and 169, nor can it be attached (*q*), nor can it pass to the heirs of the dedicator on his death.

(*j*) *Ali Raza* v. *Sanwal Das* (1919) 41 All. 34, 48 I. C. 212.
(*k*) Baillie, Part II, 218; *Haji Kalub* v. *Mehrum Bibee* (1872) 4 N. W. P. 155; *Hamid Ali* v. *Mujawar Husain* (1902) 24 All. 257.
(*l*) *Muhammad Ahsan* v. *Umardarz* (1906) 28 All. 633.
(*m*) *Hamid Ali* v. *Mujawar* (1902) 24 All. 257, 263.
(*n*) *Court of Wards* v. *Ilahi Baksh* (1912) 40 Cal. 297, 40 I. A. 18, 17 I. C. 744.
(*o*) See *Jewan Doss Sahu* v. *Shah Kubeeruddin* (1840) 2 M. I. A. 390.
(*p*) See *Afiman* v. *Hamid ud-Din* (1919) Lah. L.J. 55.
(*q*) See *Muhammad Ismail* v. *Muhammad* (1921) 43 All. 506, 62 I. C. 904.

Hed., 231, 232; Baillie, 558-560; *Mutu Ramanandan* v. *Yava Levvai* (r); *Kuttayan* v. *Mammanna* (s).

158. Doctrine of cypres.—Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed (t).

Shiah law.—The same is the rule of Shiah law: Baillie, Part II, 216.

Family Settlements by way of Wakf.

History of the Wakf Act.—In order to understand what follows, wakfs may be divided into two classes, *viz.*, (1) public, and (2) private. A public wakf is one which is *exclusively* for a religious or charitable object. A private wakf is a wakf which includes provisions for the benefit of the settlor's family, his children and descendants; it is really a wakf in favour of *unborn* descendants, and is technically called *wakf-alal-aulad.* In two cases it was laid down that "to constitute a valid wakf there must be a dedication of property *solely* to the worship of God or to religious or to charitable purposes (u), in other words that a private wakf could not be recognised by a Court of law. But this extreme view was soon rejected (v), and private wakfs came to be recognised subject to certain limitations. The question is to what extent they were recognised before the Mussalman Wakf Validating Act VI of 1913, and to what extent they are recognised under that Act. We proceed to answer this question, dividing at the same time private wakfs into two classes :—

I. Wakfs in favour of the settlor's family, children, or descendants, without any ultimate trust for the poor or for other religious or charitable purpose, as where a Mahomedan settles property for the benefit of the children and descendants *without* declaring that in the event of the extinction of the family, the income shall be applied for the benefit of the poor or for some other charitable object. Such a trust was invalid according to the decisions prior to the Wakf Act (w). It is also invalid under the Wakf Act: see the proviso to s. 3 of the Wakf Act reproduced in sec. 161 below.

II. Wakfs in favour of the settlor's family, children or descendants, along with an ultimate trust for the poor or for other religious or charitable objects.—According to the Privy Council decisions prior to the Wakf Act, such a wakf is valid, if "there is a *substantial* dedication of the property to charitable uses at some period of time or other" (x). But if the primary object of the wakf be the aggrandisement of the family, and the gift to charity is illusory whether from its small amount or from its uncertainty and remoteness, the wakf in favour of the family is invalid and no effect can be given to it. It was so held by the Judicial Committee of the Privy Council in

(r) (1917) 44 I. A. 21, 40 Mad. 116, 39 I. C. 235.
(s) (1912) 35 Mad. 680, 683, 18 I. C. 195.
(t) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 484-485; *Salebhai* v. *Bai Safiabu* (1912) 36 Bom. 111, 12 I. C. 702.
(u) *Abdul Ganee* v. *Hussen Miya* (1872) 10 Bom. H. C. 7; *Mahomed Hamidulla* v. *Lotful Huq* (1881) 6 Cal. 744.
(v) *Luchmiput* v. *Amir Alum* (1882) 9 Cal. 176; *Mahomed Ahsnulla* v *Amarchand Kundu.* (1889) 17 Cal. 498, 509, 17 I. A. 28.
(w) *Abdul Ganee* v. *Hussen Miya* (1873) 10 Bom. H. C. 7; *Nizammudin* v. *Abdul Gafur* (1888) 13 Bom. 264, affirmed by the Privy Council on appeal sub-nomine *Abdul Gafur* v. *Nizammudin* (1892) 17 Bom. 1, 19 I. A. 170.
(x) *Mahomed Ahsanulla* v. *Amarchand Kundu* (1899) 17 Cal. 1, 498, 509, 17 I. A. 28.

the year 1894 in *Abdul Fata Mahomed* v. *Rasamaya* (y). Under the Wakf Act, such a wakf is perfectly valid, whether the gift to charity be substantial or illusory. See ss. 3 and 4 of the Wakf Act reproduced in sec. 161 below.

In *Abdul Fata Mahomed's* case referred to above, the income of the wakf property was to be applied in the first instance for the benefit of the settlor's descendants from generation to generation, and the trust in favour of charity was not to come into operation *until after the extinction of the whole line of the settlor's descendants.* Their Lordships of the Privy Council held that the gift to charity was illusory, and that the sole object of the settlor was to create a family settlement *in perpetuity,* and that the provision for the settlor's family was therefore invalid. In the course of the judgment their Lordships said :—

"As regards precepts, which are held up as the fundamental principles of Mahomedan law [see sec. 24], their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities ; but they asked during the argument how it comes about that by the general law of Islam, at least as known in India, simple gifts [*hiba*] by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests are forbidden ; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf* in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any."

The decision of the Privy Council in *Abul Fata Mahomed's* case caused considerable dissatisfaction among the Mahomedan community in India. There is no doubt, so far as the *Fatawa Alumgiri* [Baillie, p. 576 *et seq.*] goes, that a family settlement with an ultimate gift to the poor, is valid as a wakf. Such a settlement may be in favour of *unborn persons* : it may create successive *life-interests* in favour of such persons ; it may be "a *perpetuity* of the worst and most pernicious kind," but all this, so the community argued, was allowed by their own law. The Government of India was thereupon put into motion, with the result that an Act was passed in 1913, called the Mussalman Wakf Validating Act, the object whereof was to remove the disability and hardship created by the said decision. But the said Act, it has been held, is not retrospective, and it is therefore necessary to state in precise terms what the law was before the passing of the Act.

159. Law relating to private wakfs before the Wakf Act.— To constitute a valid wakf, it was not necessary, even before the Wakf Act, that the property should be *solely* dedicated to religious, pious or charitable uses (z). A valid wakf could be created, even before the said Act, for the maintenance and support of the settlor's family, children or descendants, provided that—

(a) there was an ultimate gift of the whole property to charity, that is to say, the ultimate benefit was reserved for the poor or for any other religious, pious or charitable purpose ; *and*

(y) (1894) 22 Cal. 619, 634, 22 I. A. 76.

(z) This extreme view was taken in *Abdul Ganee* v. *Hussen Miya* (1873) 10 Bom. H. C. 7 at p. 13, and it was adopted in *Mahomed Hamidulla* v. *Lotful Huq* (1881) 6 Cal. 744, but it was rejected by the Privy Council in *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 509, 17 I. A. 28.

(b) the gift to charity was substantial [ills. (a) and (e)].

But if there was no ultimate gift to charity [ill. (b)], or, if there was such a gift, it was illusory, that is, it was small in amount [ill. (c)], or was too remote [ill. (d)], the provision for the settlor's family was held to be invalid.

Under the Wakf Act a Mahomedan may settle the *whole* income of the endowed property for the maintenance and support of his *descendants from generation to generation*, provided there is an *ultimate* gift to charity [s. 161]. Prior to the Act, such a *wakf* was invalid as being illusory. See the cases cited in the illustrations below.

[*Note.*—In the following illustrations, the expression "old law" means the law as settled by the Privy Council decisions before the passing of the Wakf Act.

(a) A Mahomedan conveys certain property to a mutawali, *A. B.*, with direction out of the profits of the endowed lands to defray the expenses of a mosque, to give alms to mendicants, to educate poor students, and to utilize the surplus for the marriages, burials, and circumcision of the members of *A. B.*'s family. Here there is an ultimate dedication of the whole property to charity. And, further, the dedication to charity is substantial. It is not too remote as it is in ill. (d), for it is not postponed until the extinction of the whole line of the descendants of *A. B.* This is therefore a valid wakf: *Muzhurool Huq* v. *Pubraj* (1870) 13 W. R. 235; *Deoki Prasad* v. *Inait Ullah* (1892) 14 All. 375. [Such a wakf, it need hardly be said, is also valid under the Wakf Act.]

Note.—In *Muzhurool Huq's* case Kemp, J., said: "We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, *being confined to one family*, and which after they lapse will leave *the whole property* intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law." This was approved by the Privy Council in the case cited in ill. (c) below.

(b) *A* executes a document purporting to settle as "wakf" immoveable properties on his wife, his daughter and her descendants. The deed does not contain any provision for the application of the income in the event of the family becoming extinct. This is not a valid wakf under the old law, as there is no ultimate gift to charity: *Abdul Gafur* v. *Nizammudin* (1888) 13 Bom. 264, affirmed on appeal by the Privy Council, sub nomine *Nizamuddin* v. *Abdul Gafur* (1892) 17 Bom. 1, 19 I.A. 170; *Abdul Ganee* v. *Hussen Miya* (1873) 10 Bom. H.C. 7. [*Quære* whether this is a valid wakf under the Wakf Act; see notes to s. 160 under the head "The ultimate benefit for the poor should be reserved expressly or impliedly."]

(c) A Mahomedan executes a document purporting to be a *wakfnamah* which begins with a dedication of his entire properties for certain religious purposes, namely for defraying the expenses of a mosque and two schools, and for *sadir warid*. The dedication is qualified by the words "in the manner provided by the following paragraphs" and these paragraphs contain provisions for the appointment of the settlor's sons and descendants as mutawalis and for their salary, and for the maintenance and support of his family and descendants *from generation to generation*. The only provision for the religious works is that the mutawalis should continue to perform them *according*

to custom, and this requires *a very small expenditure* compared to the income. The effect of the deed as a whole is that, while it professes to dedicate as wakf properties bringing in an annual income of about Rs. 12,000, it leaves it to the members of the family, who are as mutawalis to retain the control and management, to spend what is customary for the said religious purposes, and to take as much as they like for themselves and the members of the family for all time on account of salary as maintenance. This is not a valid wakf under the old law, for the main purpose of the settlement is the *aggrandisement of the settlor's family*, and the gift to charity is illusory by reason of the *smallness of its amount*: *Mahomed Ahsanulla* v. *Amarchand Khandu* (1889) 17 Cal. 498, 17 I. A. 28; *Mujib-un-nissa* v. *Abdur Rahim* (1900) 23 All. 233, 28 I. A. 15 [where the income to be devoted to charity was left entirely to the mutawali for the time being]; *Muhammad Munavar* v. *Razia Bibi* (1905) 27 All. 320, 32 I. A. 86; *Fazlur Rahim* v. *Mahomed Obedul* 1903) 30 Cal. 666. [This is a perfectly good wakf under the Wakf Act.]

Note.—In *Mahomed Ahsanulla's* case their Lordships of the Privy Council observed: "If indeed it were shown that the *customary* uses were of such magnitude as to *exhaust* the income or to absorb the *bulk* of it, such a circumstance would have its weight in ascertaining the intention of the grantor." Accordingly, where a Mahomedan dedicated certain property, of which the average annual income was Rs. 850, to the performance of *fatehah* and *kadam sharif* ceremonies, and it was found that according to the custom prevailing in the country the amount required for the ceremonies was Rs. 500 per annum, it was held by the High Court of Allahabad that the dedication to religious purposes was *substantial* and that the wakf was therefore valid: *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211.

(d) Two Mahomedan brothers execute a deed purporting to make a wakf of all their immoveable properties for the benefit of their children and their descendants from generation to generation, and, *on total failure of all their descendants*, for the benefit of widows, orphans, beggars and the poor. The provision for the settlor's children and their descendants is void according to the old law, for the gift to the poor is *too remote*, as it is not to take effect until the total extinction of all the descendants of the settlor: *Abdul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619, 22 I. A. 76. [This is expressly declared to be a good wakf under the Wakf Act: see s. 4. of the Act reproduced in sec. 161 below.]

In the above case their Lordships of the Privy Council said: "If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognised as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position. Their Lordships agree that the poor have been put into this settlement merely to give it a *colour of piety*, and so to legalize arrangements meant to serve for the *aggrandisement of a family*."

(e) Two Mahomedan brothers execute a deed whereby they settle lands of the value of Rs. 20,000 in trust to apply an *indeterminate* portion of the income for the due performance of customary fatiha for ancestors and to alms giving and to apply the residue of the income in perpetuity for the benefit of the settlor's sons and their descendants without power of alienation. The amount required for fatiha and alms-giving is estimated by the Court at Rs. 600 per annum. The total income of the trust estate is estimated at Rs. 1,500, leaving a balance of Rs. 900 for the benefit of the settlor's descendants.

It was held by their Lordships of the Privy Council that though only two-fifths of the income would be devoted to the charity, and three-fifths would go to the family, the effect of the deed was to give the property in substance to charitable uses, and that the deed was therefore valid. Their Lordships said : " But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently and the needs of the charity may expand even. The *paramount* purpose of the grantors was evidently to provide for all the needs of those charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. *It is the residue, which may be a dwindling sum, that is given to the family.* The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is not to give the property in substance to the family, and that therefore it is invalid as a deed of wakf, is, their Lordships think, entirely unsound ": *Mutu Ramanandan* v. *Yava Levvai* (1917) 44 I. A. 21, 40 Mad. 116, 39 I. C. 235.]

Failure of family trusts : its effect upon subsequent trusts for charity.—Suppose that the gift to charity is too remote as in ill. (d), and the trusts in favour of the settlor's family are thereupon declared to be invalid, does the failure of the family trusts involve the failure of the subsequent gift to charity so as to entitle the settlor or his heirs to recover back the settled properties from the mutawali ? In *Fatma Bibi* v. *The Advocate-General* (a), the High Court of Bombay held that even if the trusts in favour of the family were not enforceable, the subsequent trust for charity did not fail with them, but that it was accelerated and took effect immediately, and the settlor was not therefore entitled to get back the properties. That case was decided 13 years before the decision of the Privy Council referred to in ill. (d) above, and the Court was inclined to the view that the trusts for the settlor's family were valid. Since the Privy Council decision, however, it could well be said of the settlement that was before the Bombay High Court, that " the poor had been put into the settlement merely to give it a colour of piety," and if the trusts in favour of the family are void on that ground, there is no reason why the gift for the poor, which is merely colourable, should be enforced by the Court. The question now under consideration did not arise in any of the cases before the Privy Council, but in two of them the decree of the High Court which was affirmed by the Privy Council proceeded on the assumption that the settlor's heirs were entitled to immediate possession from the mutawali (b). This question cannot arise in cases governed by the Wakf Act, for under that Act a wakf is valid in its entirety, though the gift to charity is not to take effect until after extinction of the descendants of the settlor.

Failure of family trusts : its effect upon concurrent trusts for charity.—Suppose that there is a concurrent gift to charity ; suppose further that it is illusory by reason of the smallness of the amount, and that the trusts in favour of the family are thereupon declared to be invalid. Should effect be given to the concurrent gift to charity ? This question has been answered in the affirmative, but there is a difference of opinion as to the extent to which effect should be given to it as will appear from the following illustration :—

A Mahomedan executes a deed purporting to be a *wakfnama* providing for the payment of Rs. 75 per annum out of the income of the property to the poor, and Rs. 400

(a) (1881) 6 Bom. 42.

(b) *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 398, 17 I. A. 28 [where it was held that the wakf being void, a creditor of one of the heirs was entitled to attach his share in the endowed property] ; *Muhammad Munavar* v. *Razia Bibi* (1905) 27 All. 320, 32 I. A. 86 [decree for the settlor's heirs in a suit by them for their share of the endowed property, the wakf being void].

per annum to his children and their descendants "from generation to generation." Here the gift to charity is illusory by reason of its smallness. The family trusts, therefore, fail, but the gift to charity is valid, according to the Calcutta (c) and Bombay (d) High Courts, to the extent of Rs. 75 per annum; according to the Madras High Court, it is valid to the extent of the *entire* income (Rs. 400) of the property (e). The Madras decision, it is submitted, is a result of the misapplication of the Mahomedan doctrine of *cypres* (f) [see s. 158].

A case like the one we are now dealing with cannot arise under the Wakf Act, for under that Act the whole wakf is valid.

Family arrangement based on an invalid wakf.—*A* executes a deed of wakf. After *A*'s death some of his heirs bring a suit against the mutawali and other heirs to set aside the wakf on the ground that the gift to charity is illusory. The suit is compromised and an agreement is made whereby the members of the family agree that the wakf is valid and that allowances fixed thereunder should be paid out of the income to named members of the family and upon the death of any of the named persons to his heirs. The agreement being for consideration, it is enforceable as constituting a valid charge upon the property, although the wakf is invalid (g).

Limitation.—As to the period of limitation for a suit to recover possession of endowed property on the ground that the wakf is void, see the undermentioned cases (h).

160. Law relating to private wakfs under the Wakf Act.—The Mussalman Wakf Validating Act VI of 1913 is not retrospective (i), that is to say, it does not apply to wakfs created before the date on which it came into force [*i.e.*, 7th March 1913]. By the said Act it is provided in effect as follows:—

(1) It is competent to a Mahomedan to create a wakf for the maintenance, and support wholly or partially of his family, children, or descendants, and, where the person creating a wakf is a Hanafi Mussalman, also for *his own* maintenance and support during his lifetime or *for the payment of his debts* out of the rents and profits of the property dedicated, provided that the ultimate benefit is in such a case "expressly or impliedly" reserved for the poor or for any other purpose recognized by the Mahomedan law as a religious, pious or charitable purpose of a permanent character.

(c) *Bikani Miya* v. *Shuk Lal* (1892) 20 Cal. 116, 204, 225, following *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 511, 17 I. A. 28.

(d) *Mahomed* v. *Mahomed* (1903) 5 Bom. L. R. 624; *Abdul Rajak* v. *Jimbabai* (1911) 14 Bom. L. R. 295, 302 14 I. C. 988, following 17 Cal. 498, *supra*.

(e) *Ramanadhan* v. *Vada* (1910) 34 Mad. 12, 18-20, 6 I.C.1., s.c. on app. to P. C. (1917) 44 I. A. 21,40 Mad. 116, 39 I.C. 235.

(f) See *Mazhar Husain* v. *Abdul* (1911) 33 All. 400, 405-406, 413, 9 I.C. 753.

(g) *Khajeh Solehman* v. *Nawab Sir Salimullah* (1922) 49 I. A. 153, 49 Cal. 820, 69 I. C. 138, ('22) A.P.C. 107.

(h) *Mahomed Ibrahim* v. *Abdul Latif* (1912) 37 Bom. 447, 460-463, 17 I.C. 689; *Muhamad Munavar* v. *Razia Bibi* (1905) 27 All. 320, 324, 32 I. A. 86, in appeal from 21 All. 320; *Abdul Ganee* v. *Hussen Miya* (1873) 10 Bom. H. C. 7, 15-16.

(i) *Khajeh Solehman* v. *Nawab Sir Salimullah* (1922) 49 I. A. 153, 49 Cal. 820, 69 I. C. 138, ('22) A.P.C. 107; *Amir Bibi* v. *Azizabibi* (1914) 39 Bom. 563, 29 I. C. 906; *Rahimunissa* v. *Sheikh Manik Jan* (1914) 19 Cal. W. N. 76, 79, 27 I. C. 96; *Mahomed Buksh* v. *Dewan Ajmer* (1916) 43 Cal. 158, 32 I. C. 701; *Mutu Ramanandan* v. *Yava Levvai* (1917) 44 I. A. 21, 26, 40 Mad. 116, 121, 39 I. C. 235; *Naim-ul-Haq* v. *Muhammad* (1919) 41 All. 1, 48 I. C. 94.

(2) No such wakf is to be deemed to be invalid merely because the ultimate benefit for the poor or for such purposes as aforesaid is postponed until after the extinction of the family, children or descendants of the person creating the wakf [Wakf Act, ss. 3-4].

• See the illustrations to s. 159 above.

As under the Privy Council decisions, so under the Wakf Act, it is absolutely necessary to the validity of a wakf that there should be an *ultimate* dedication of the whole property to charity. But while according to the Privy Council decisions, a wakf is not valid unless the *concurrent* gift to charity was substantial, a wakf created after the passing of the Wakf Act is valid even if there be no *concurrent* gift to charity at all. The result is that a Mahomedan may now create a wakf for the benefit of his descendants in perpetuity, and may not give any portion of the income to charity so long as any of his descendants is in existence, provided there is an *ultimate* gift to charity. This is in accordance with the view of Mahomedan law as taken by West, J., in *Fatma Bibi* v. *The Advocate-General* (*j*), by Farran, J., in *Amrutlal* v. *Shaik Hussain* (*k*), and by Ameer Ali, J., in *Bikani Miya* v. *Shuk Lal* (*l*). In the former case, West, J., said ;

" If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefit these successively take may constitute a perpetuity in the sense of the English law ; but according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object is clearly designated."

It need hardly be stated that the view taken by West, J., Farran, J., and Ameer Ali, J., was disapproved by the Privy Council in *Abdul Fata Mahomed* v. *Rasamaya* (*m*). See ill. (d) to s. 159.

The ultimate benefit for the poor should be reserved expressly or impliedly.—According to Abu Hanifa and Muhammad, it is necessary to the completeness or a wakf that the ultimate benefit for the poor should be *expressly* reserved. According, however, to Abu Yusuf, such benefit may be reserved *impliedly*, and this can be done by the mere use of the word " wakf." Thus according to Abu Yusuf, if a person simply says " I give this land by way of *wakf* to Zeyd," the wakf is complete, and Zeyd has the usufruct for his life, and after his death, the income will go to the poor, though the poor are not expressly mentioned (*n*). The Fatawa Alumgiri declares a preference for the opinion of Abu Yúsuf (*o*). In the first case cited in ill. (b) to s. 159, the High Court of Bombay held that the opinion of Abu Hanifa and Muhammad was to be preferred to that of Abu Yusuf, and it accordingly held that there being no express provision for the ultimate gift to charity, the deed was not valid as a wakf. This decision was upheld by the Privy Council on appeal (*p*). Is it intended by the word " impliedly " which occurs in s. 3 of the Wakf Act to give effect to the opinion of Abu Yusuf ? If so, the wakf in the Bombay case above refered to [ill. (b) to s. 159] would be a valid wakf under the Wakf Act. In a recent Rangoon case it was held that a mere declaration of wakf without specifying the objects of the trust is valid, the presumption being that the property was dedicated for religious and charitable purposes (*q*).

(*j*) (1881) 6 Bom. 42, 53.
(*k*) (1887) 11 Bom. 493.
(*l*) (1893) 20 Cal. 116, 132-177.
(*m*) (1894) 22 Cal. 619, 22 I. A. 76.
(*n*) Hedaya, p. 234.
(*o*) Baillie's Digest, p. 558.
(*p*) *Abdul Gafur* v. *Nizamuddin* (1892) 17 Bom. 1, 19 I. A. 170.
(*q*) *Ma E Khin* v. *Maung Sein* (1924) 2 Rang. 495, 511, 88 I. C. 167, ('25) A. R. 71.

161. Text of the Mussalman Wakf Validating Act.—The following is the text of the Wakf Act 6 of 1913, which came into force on 7th March 1913 :—

An Act to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants.

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows :—

Short title and extent.

1. (*1*) This Act (*r*) may be called the Mussalmans Wakf Validating Act, 1913.

(*2*) It extends to the whole of British India.

Definitions.

2. In this Act unless there is anything repugnant in the subject or context.

(1) "Wakf" means the permanent dedication (*s*) by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable (*t*).

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

Power of Mussalmans to create certain wakfs.

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law (*u*), for the following among other purposes :—

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated (*v*) :

Provided that the ultimate benefit is in such cases expressly or impliedly (*w*) reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character (*x*).

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf (*y*).

(*r*) The Act is not retrospective: (1914) 39 Bom. 563, 26 I. C. 906; (1914) 19 Cal. W. N. 76, 79, 27 I. C. 96.

(*s*) According to the Privy Council decisions in 17 Cal. 498 and 22 Cal. 619, the dedication to charity should be *substantial*. It need not be so under the Act. See ss. 159 and 160, and the notes thereto.

(*t*) See s. 146.

(*u*) See ss. 146 to 154.

(*v*) This is not a new provision. It is in accordance with the law as settled before the Act. It is inserted here to give a completeness to the matter dealt with in the sections. See s. 155 and the notes thereto.

(*w*) See notes to s. 160.

(*x*) This is in accordance with the dictum of West, J., in 6 Bom. 42, at p. 53, followed by Farran, J., in 11 Bom. 493.

(*y*) Contrast with this the observations of their Lordships of the Privy Council in 22 Cal. 619, at p. 634, and see ss. 26, 159 and 160 and the notes thereto.

Saving of local and sectarian custom. 5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

162. Succession per stirpes.—In the case of a wakf in favour of descendants as contemplated by s. 3 of the Wakf Act, the succession is *per stirpes*, and not *per capita*, contrary to the general rule of the Hanafi law of inheritance (*z*).

163. Sons and daughters take equal shares.—In the case of such a wakf as is referred to in sec. 162, males and females take equal shares, unless it is otherwise expressly provided (*a*).

As to descendants in the female line, see the undermentioned cases (*b*).

Of Mutawalis or Managers of Wakf property.

163A. Mutawali.—A mutawali is a superintendent or manager of wakf property. If appointed by an indenture of trust in the English form, the wakf property vests in him as a trustee. If appointed orally or by an informal writing called wakfnamah, he is more like a receiver appointed over property than a trustee and he has no estate in the property which he is appointed to manage; he possesses powers over it but not an interest in it (*c*).

A by a wakfnamah appoints himself the first mutawali of an immoveable property dedicated by him to charity, and appoints *B* and *C* to succeed him as mutawalis. After *A*'s death, his heirs take possession of the property, and refuse to deliver possession of the property to *B* and *C* alleging (1) that the wakf is not valid, and (2) that the wakf property is not vested in *B* and *C*. The Court finds that the wakf is valid. *B* and *C* are entitled to a decree for possession, though they are not trustees appointed by an Indenture of Trust and though the wakf property is not vested in them as such (*d*).

The question as to which of two or more rival claimants is entitled to act as mutawali may be referred to arbitration. The appointment of a person as mutawali by an arbitrator is not invalid (*e*).

164. Who may be mutawali.—(*1*) Subject to the provisions of sub-s. (2), the founder of a wakf may appoint himself (*f*)

(*z*) Macnaghten, 341; *Sayad Mahomed* v. *Sayad Gohar* (1881) 6 Bom. 88, 90-91.

(*a*) Macnaghten, 342; Baillie, 553 *et seq.*

(*b*) *Abdul Ganee* v. *Husen Miya* (1873) 10 Bom. H. C. 7, at p. 14; (*Shekh Karimodin* v. *Nawab Mir Sayad* 1885) 10 Bom. 119.

(*c*) *Muhammad Rustam Ali* v. *Mushtaq Husein* (1920) 47 I. A. 224, 42 All. 609, 57 I.C. 329, *Narain Das* v. *Haji Abdur Rahim* (1920) 47 Cal. 866, 879, 58 I. C. 705; *Vidya* v. *Balusami* (1921) 48 I. A. 302, 44 Mad. 831, 65 I. C. 161, ('22) A. P. C. 123.

(*d*) (1920) 47 I. A. 224, 42 All. 609, 57 I.C. 329, *supra*.

(*e*) *Moazzam* v. *Raza* (1924) 46 All. 856, 81 I. C. 851, ('24) A. A. 81.

(*f*) Baillie, 601; Hedaya, 238; Baillie, Part II, 214; *Advocate-General* v. *Fatima* (1872) 9 B. H. C. 19; *Abdul Rajak* v. *Jimbabai* (1911) 14 Bom. L. R. 295, 14 I. C. 988; *Muhammad Rustam Ali* v. *Mushtaq Husain* (1920) 47 I. A. 224, 42 All. 609. 57 I.C. 329.

or his children and descendants (*g*), or any other person, even a female (*h*) or a non-Moslem (*i*), to be mutawali of wakf property.

But where the wakf involves the performance of religious duties, such as the duties of a *sajjadanishin* (spiritual preceptor [s. 175], a *muezzin* (crier), a *khatib* (Koran-reader), or an Imam in a mosque, neither a female (*j*) nor a non-Moslem (*k*) is competent to perform those duties, though they may perform such of the duties attached to the wakf as are of a secular nature.

(2) Neither a minor (*i.e.*, one who has not attained puberty) nor a person of unsound mind can be appointed mutawali (*l*). But where the office of mutawali is hereditary, and the person entitled to succession is a minor, the Court may appoint another person, to discharge the duties of mutawali during the minority of the person entitled thereto (*m*).

Where the *Mutawaliship* goes with the office of *sajjadanishin*, a woman cannot succeed to the *mutawaliship* either solely or jointly with another, the reason being that the office of *sajjadanishin* is a priestly office involving the performance of spiritual and religious duties which, according to Mahomedan Law, cannot be performed by a woman (*n*).

165. Appointment of a new Mutawali.—Whenever any person appointed a mutawali dies, or refuses to act in the trust, or is removed by the Court, or the office of mutawali otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the Office, a new mutawali may be appointed (*o*)—

(a) by the founder of the wakf, if he be dead;

(b) by his executor (if any);

(*g*) Baillie, 601.
(*h*) Baillie, 601; *Wahid Ali* v. *Ashruff Hossein* (1882) 8 Cal. 732; *Shahar Banoo* v. *Aga Mahomed* (1907) 34 Cal. 118, 34 I. A. 46; *Munnavaru Begam* v. *Mir Mahapalli* (1918) 41 Mad. 1038, 51 I. C. 489.
(*i*) Ameer Ali, Vol. I, 351.
(*j*) *Hussain Beebee* v. *Hussain Sheriff* (1868) 4 M. H. C. 23; *Ibrambibi* v. *Hussain Sheriff* (1880) 3 Mad. 95 [*Mujavar* of a durga] *Munnavaru Begam* v. *Mir Mahapalli* (1918) 41 Mad. 1033, 1038, 51 I. C. 489 [Imam of a mosque.] *Shahoo Banoo* v. *Aga Mahomed* (1907) 34 Cal. 118.
(*k*) Ameer Ali, Vol. I, 351.
(*l*) Baillie, 601; *Piran* v. *Abdool Karim* (1891) 19 Cal. 203, 219-220; *Syed Hasan* v. *Mir Hasan* (1917) 40 Mad. 941, 38 I. C. 528
(*m*) (1891) 19 Cal. 203, 220, *supra*; *Ejaz Ahmad* v. *Khatun Begam* (1917) 39 All. 288, 37 I. C. 885.
(*n*) *Kaniz* v. *Saiyid* (1923) 2 Pat. 819, ('23) A. P. 241, 77 I. C. 209.
(*o*) *Advocate-General* v. *Fatima* (1872) 9 B. H. C. 19; *Khajeh Salimullah* v. *Abdul Khair* (1909) 37 Cal. 263; 3 I. C. 419; *Phatmabai* v. *Haji Musa* (1913) 38 Mad. 491, 21 I. C. 964.

(c) if there be no executor, the mutawali for the time being may, on his death-bed, appoint his own successor subject, however, to the provisions of s. 166 below;

(d) if no such appointment is made, the Court may appoint a mutawali. In making the appointment the Court must have regard to the following rules:—

(i) The Court should not (even if it be assumed that it has the power to do so) disregard the directions of the founder except for the manifest benefit of the endowment (*p*);

(ii) the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office (*q*);

(iii) where there is a contest between a lineal descendant of the founder and one who is merely related to the founder but is not his lineal descendant, the Court is not bound to appoint the lineal descendant, but it has a discretion in the matter, and in the exercise of that discretion it may appoint such relation in preference to the lineal descendant (*r*);

(iv) the right of management of religious institutions such as Khangahs attached to Dargas is to be decided according to the prevailing usage, that usage being taken as an indication of the direction of the founder (*s*).

Baillie, 603-604; *Macnaghten*, p. 70, sec. 6, p. 344, case X.

Clause (*d*), *sub-cl.* (iii).—In *Shahar Benoo* v. *Aga Mahomed*, cited in cl. (iii), the founder was a Shiah, and his lineal descendant who claimed to be appointed mutawali was a female of the Babi sect. The Court refused to appoint her mutawali, saying that though she was not disqualified from acting as a mutawali, she being a female could at best discharge many of her duties only by deputy, and being a Babi she might not take a zealous interest in carrying out the religious observances of the Shiah school for which

(*p*) *Khajeh Salimullah* v. *Abdul Khair* (1909) 37 Cal. 263, 268, 37 I. C. 419.

(*q*) 9 B. H. C. 19, *supra*.

(*r*) *Shahar Banoo* v. *Aga Mahomed* (1907) 34 Cal. 118, 34 I. A. 46.

(*s*) *Ismailmya* v. *Wahadani* (1912) 36 Bom. 308, 14 I. C. 469.

the trust was founded, and the Court appointed as mutawali a relation of the founder though he was not a lineal descendant of the founder. Their Lordships of the Privy Council after stating that their attention had been called to the earlier texts said: "The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution."

Powers of Court.—As regards the management of public religious or charitable trusts, their Lordships observed in *Mahomed Ismail* v. *Ahmed Moola* (*t*) as follows:

"It has further been contended that under the Mahomedan law the Court has no discretion in the matter [*i.e.*, appointment of trustees of the mosque in question] and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or mutawalis. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussalman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the *objects* of the benefaction; but as regards *management*, which must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution." In the case cited above, the dispute was as regards the management of a Sunni mosque in Rangoon. The Sunnis of Rangoon are some of them Randherias and some of them Soorties. The mosque was founded by a Randheria, it was subsequently rebuilt and improved with money the bulk of which was supplied by Randherias, and the management had been for about 50 years in the hands of Randherias. It was not alleged that they had mismanaged the trust. Under these circumstances their Lordships held that all other conditions, being equal, the Randheria section was perfectly entitled to manage and act as trustees of the mosque.

166. Mutawali may appoint successor on his death-bed.—In the absence of any provision in the deed of Wakf, or of any evidence of usage regarding the devolution of the office of mutawali, the mutawali for the time being may, on his death-bed, nominate his successor; but such appointment cannot be made if the founder is alive or if he has left an executor competent to make the appointment (*u*). [See s. 165.]

(*t*) (1916) 43 I. A. 127, 134, 43 Cal. 1085 1100, 35 I. C. 30. See also *Ibrahim Esmael* v. *Abdool Carrim* (1908) 35 I. A. 151, 164 [a case from Mauritius].

(*u*) Baillie, 604; *Piran* v. *Abdool Karim* (1891) 19. Cal. 203, 219; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058.

The appointment of a successor by a mutawali can only be made while on death-bed or in death-illness. A mutawali has no power to renounce the office and transfer it to another person while he is in good health (as distinguished from being on death-bed or in death-illness), unless such a power was expressly conferred upon him by the founder. But a mutawali may appoint a deputy, whenever he likes, to help him in the management, *e.g.*, in collecting the rents or other proceeds of the endowed property and expending them for the purposes of the endowment (*v*).

A mutawali may appoint even a stranger as his successor in office; he is not bound to appoint a member of the family of the founder (*w*).

167. Office of mutawali not hereditary.—The Mahomedan law does not recognize any right of inheritance to the office of mutawali (*x*).

Where there is a vacancy in the office of mutawali, and the Court is called upon to appoint a mutawali, the Court will ordinarily appoint a member of the founder's family in preference to a stranger, and a senior member in preference to a junior member. But where no such appointment is to be made, and the suit is merely one to oust the defendant from the office of mutawali, the defendant *being already in possession and enjoyment of the office*, the Court will not oust the defendant from the office, merely because the plaintiff is the elder brother and the defendant a younger brother, or because the plaintiff is a member of the founder's family and the defendant is a stranger. The reason is that according to Mahomedan law no right of inheritance attaches to the office of mutawali. The office, however, may be hereditary by *custom*. But such a custom, being opposed to the general law, must be supported by strict proof. The mere fact that three persons from the family of the plaintiff were successively mutawalis is not sufficient to prove that the office devolved by heredity (*y*).

168. Mutawali cannot mortgage or sell.—(*1*) A mutawali has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so.

(*2*) A mortgage of wakf property, though made without the previous sanction of the Court, is not void if made for a justifying necessity, and may be *retrospectively* confirmed by the Court (*z*).

Baillie, 605. Where the rate of interest on a mortgage is excessive, the Court may award interest to the mortgagee at a lower rate.

(*v*) Baillie, 604; *Khajeh Salimullah* v. *Abdul Khair* (1909) 37 Cal. 263, 277-278, 3 I. C. 419; *Wahid Ali* v. *Ashruff Hussain* (1882) 8 Cal. 732; Ameer Ali, 3rd ed., Vol. 1, pp. 355-356. See *Sultan Ahmad* v. *Abdul Gani* (1919) 46 Cal. 13, 18.

(*w*) *Sheikh Amir Ali* v. *Syed Wazir* (1905) 9 C. W. N. 876.

(*x*) Macnaghten, p. 344, case X; *Sayad Abdulla* v. *Sayad Zain* (1889) 13 Bom. 555, 561; *Phatmabi* v. *Haji Musa* (1913) 38 Mad. 491, 21 I. C. 964; *Atimannessa* v. *Abdul Sobhan* (1916), 43 Cal. 467, 32 I. C. 21.

(*y*) 13 Bom. 555, *supra*; 38 Mad. 491, 21 I. C. 964, *supra*.

(*z*) *Nimai Chand* v. *Golam Hussein* (1909) 37 Cal. 179, 3 I. C. 353. See *Afiman* v. *Hamid-ud-Din* (1919) Lah. L. J. 55.

Permission of Court, how to be obtained.—It was held by the Calcutta High Court in a case decided in 1909 that a mutawali, desirous of obtaining the sanction of the Court for a sale, mortgage, or lease of wakf property, must proceed by way of suit, and not by an application under the Trustees Act 27 of 1866, the reason given being that the Trustees Act applies only to trusts in the English form constituted by persons of purely English domicile or by persons governed by the Indian Succession Act, and that it does not apply to Mahomedans (*a*). But this decision was disapproved in recent cases where it was held that the sanction may be obtained on an application and that no suit is necessary (*b*). In Bombay it would seem that leave may be obtained on an application under the Trustees Act (*c*).

Unauthorized alienation—period of limitation.—A mutawali sells or mortgages or grants a lease of wakf property without the sanction of the Court. What is the period after which the possession of the alienee becomes adverse against the wakf ? This question has been considered in the undermentioned cases (*d*).

169. Power of mutawali to grant leases.—A mutawali should not lease wakf property, if it be agricultural, for a term exceeding three years, and, if non-agricultural, for a term exceeding one year—

(a) unless he is expressly authorised by the deed of wakf to do so ;

(b) or, where he has no such authority, unless he has obtained the leave of the Court to do so (*e*) ; such leave may be granted even though the founder may have expressly prohibited the grant of a lease for a longer term.

Baillie, 606-607. As to limitation in the case of unauthorized leases, see *Vidya Varuthi* v. *Balusami* (1921) 48 I. A. 302, 44 Mad. 831, 65 I. C. 161.

170. Allowance of officers and servants.—The mutawali has no power to increase the allowance of officers and servants attached to the endowment, but the Court may in a proper case increase such allowance.

Ameer Ali, vol. I, 369.

(*a*) *Halima Khatun in re,* (1909) 37 Cal 870, 7 I. C 33.

(*b*) *Fakrunnessa* v. *District Judge* (1920) 47 Cal 592, 56 I. C 475 ; *Habibar* v. *Saidannessa* (1924) 51 Cal. 331, 77 I. C. 949, ('24) A. C. 473.

(*c*) See *Kahandas* v. *Narandas* (1881) 5 Bom 154, and *Lang* v. *Moolji* (1919) 21 Bom. L. R. 1111, 54 I C 455, where it was held, on a petition for appointment of new trustees, that the Act applied to Hindus in Bombay.

(*d*) *Vidya* v. *Balusami* (1921) 48 I. A. 302, 44 Mad. 831, 65 I. C. 161, ('23) A. P. C. 123; *Abdur Rahim* v. *Narayan Das* (1923) 50 I. A. 84, 50 Cal. 329, 71 I. C. 646, ('23) A. P. C. 44, [mortgage]; *Subbaiya* v. *Mahamad* (1923) 50 I. A. 295, 46 Mad. 751, 74 I. C. 492, ('23) A. P. C. 175 [sale in execution of decree].

(*e*) *Woozatunnissa, in the matter of* (1908) 36 Cal. 21.

171. Remuneration of mutawali.—The founder may provide for the remuneration of the mutawali whether the mutawali be the founder himself or some other person. Such remuneration may be a fixed sum or it may be the residue of the income of the wakf property after defraying the expenses necessary for the maintenance of the wakf (*f*). If no provision is made by the founder for the remuneration of the mutawali, the Court may fix a sum not exceeding one-tenth of the income of the wakf *property* (*g*). If the amount fixed by the founder is too small, the Court may increase the allowance, provided it does not exceed the limit of one-tenth (*h*).

172. Removal of mutawali.—A mutawali may be removed by the *Court* on proof of misfeasance or breach of trust, or if it be found that he is otherwise unfit to hold the office, though the founder may have expressly directed that the mutawali should not be removed in any case. The *founder* has no power, after delivery of possession, to remove a mutawali, unless he has expressly reserved such power in the deed of wakf.

Baillie, 608 ; Macnaghten, p. 79, s. 5 ; *Gulam Husain* v. *Aji Ajam* (1860) 4 Mad. H.C. 44 ; *Advocate-General* v. *Fatima* (1870) 9 Bom. H. C. 19, 23-24) [a Shiah case] ; *Hidaitoonnissa* v. *Syed Afzool* (1870) 2 N. W. P. 422 [a Shiah case]. A founder, who is himself a *mutawali*, may be removed by the Court on the ground of misconduct.

173. Personal decree against mutawali.—(*1*) No portion of the *corpus* of wakf property can be attached and sold in execution of a personal decree against the mutawali, not even if there be a margin of profit coming to him after the performance of the duties attaching to his office. But the surplus profit that may remain in the hands of the mutawali for his own benefit may [probably] be attached (*i*).

(*2*) The office of mutawali cannot be attached in execution of a personal decree against him (*j*).

In *Bishen Chand* v. *Nadir Hoosein* (1887) 15 Cal. 329, 15 I. A. 1, it was contended on behalf of the decree-holder that as some surplus always remained in the hands of the trustee after the performance of the trusts, he (the decree-holder) was entitled to attach so much of the *corpus* as was represented by the surplus *income*. But it was held by their Lordships of the Privy Council confirming the decision of the Calcutta High Court, that "the *corpus* of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties."

(*f*) *Sayid Ismail* v. *Hamedi Begum* (1921) 6 Pat. L. J. 218, 233-234, 62 I. C. 455.

(*g*) *Mohiuddin* v. *Sayiduddin* (1893) 20 Cal. 810, 821.

(*h*) Ameer Ali, Vol. I, 369.

(*i*) *Bishen Chand* v. *Nadir Hossein* (1887) 15 Cal. 329, 15 I. A. 1.

(*j*) *Sarkum* v. *Rahaman Buksh* (1896) 24 Cal. 83, 91.

Miscellaneous.

174. Public Mosques.—Every Mahomedan is entitled to enter a mosque dedicated to God, whatever may be the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school. But it is not certain whether a mosque appropriated exclusively by the founder to any particular sect or school can be used by the followers of another sect or school.

Ata-Ullah v. *Azim-Ullah* (1889) 12 All. 494; *Jangu* v. *Ahmad-Ullah* (1889) 13 All. 419; *Fazl Karim* v. *Maulla Baksh* (1891) 18 Cal. 448, 18 I. A. 59; *Abdus Subhan* v. *Korban Ali* (1908) 35 Cal. 294; *Maula Bakhsh* v. *Amir-ud Din* (1920) 1 Lah. 317, 57 I. C. 1000

In the first of these cases, it was held by the High Court of Allahabad, that a mosque dedicated to God is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. This ruling was referred to by their Lordships of the Privy Council in *Fazl Karim's* case, but they declined to express any opinion on it, stating that the facts of the case before them did not properly raise that question. In *Abdus Subhan's* case, the High Court of Calcutta doubted whether a special dedication of a mosque to any particular sect of Mahomedans would be in accordance with Mahomedan Ecclesiastical law. The view taken in *Ata-Ullah's* case was followed by the High Court of Lahore in *Maula Bakhsh's* case. The point cannot therefore be said to be quite settled. But when a mosque is not appropriated to any particular sect, there is no doubt that it may be used by any Mahomedan for the purposes of worship without distinction of sect. Thus a Shafei may join in a congregational worship, though the majority of worshippers in the congregation may be Hanafis; and he cannot be prevented from taking part in the service, because according to the Shafei practice he pronounces the word *amin* (amen) in a loud voice, and the Hanafi practice is to mutter the word softly. Similarly, Mahomedans of the *Amil-bil-hadis* or *Wahabi* sect have the right to worship in a mosque built primarily for the use of Hanafis and generally used by them, though their views in the matter of ritual differ from those of the Hanafis. But there is nothing in the Mahomedan law to entitle the members of a new sect to pray as a *separate* congregation behind an Imam chosen by themselves (*k*).

As to management of mosques, see notes to s. 165, "Powers of Court."

175. Sajjadanishin: Khankah.—A *sajjadanishin* is the head of a khankah, a Mahomedan institution analogous in many respects to a math where Hindu religious instruction is dispensed. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has, ordinarily speaking, a larger right in the surplus income than a mutawali (*l*). But this does

(*k*) *Hakim Khalil* v. *Malik Israfi* (1917) 2 Pat. L. J. 108, 37 I. C. 302.

(*l*) *Vidya Varuthi* v. *Balusami* (1921) 48 I. A. 302, 312, 44 Mad. 831, 841, 65 I. C. 161, ('23) A. P. C. 123; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058.

not mean that in every case the whole income from a khankah is at the disposal of the *sajjadanishin*. At certain shrines the members of the founder's family other than the sajjadanishin are entitled to share in the surplus offerings which remain after payment of expenses (*m*).

The word "sajjadanishin" is derived from *sajjada*, that is, the carpet used by Mahomedans for prayer, and *nishin*, that is sitting. The sajjadanishin takes precedence on the carpet during prayers [Baillie, p. 608, f. n. (1)]. The office of a mutawali is a secular office; that of a *sajjadanishin* is a spiritual office, and he has certain spiritual functions to perform. A person may hold the office both of a mutawali and a *sajjadanishin* at the same time. A *sajjadanishin* may, like a mutawali (s. 167) appoint his own successor. As to the distinction between the two offices, see the undermentioned cases (*n*). A minor cannot act, and he therefore cannot be appointed a *sajjadanishin* (*o*).

175A. Takia.—A *takia* is a religious institution recognized by law, and an endowment to a *takia* is as valid a wakf as to a khankah (*p*) [s. 175].

" Takia " means literally a resting place. The word is now used to denote the place where a *fakir* (holy person) resides and imparts religious instructions to his disciples and others.

Law relating to the protection, enforcement and administration of endowments.

176. The following is a list of enactments which provide for the protection, enforcement and administration of endowments :—

(i) Official Trustees Act 2 of 1913.

(ii) Charitable Endowments Act 6 of 1890, ss. 2, 3, 4, 5, 6 and 8.

(iii) Religious Endowments Act 20 of 1863, s. 14.

(iv) The Code of Civil Procedure, 1908, s. 92.

(v) Charitable and Religious Trusts Act 13 of 1920.

(*m*) *Muhammad Hamid* v. *Mian Mahmud* (1923) 50 I. A. 92, 105-106, 4 Lah. 15, 29. ('22) A. P. C. 384.

(*n*) *Piran* v. *Abdool Karim* (1891) 19 Cal. 203; *Secretary of State* v. *Mohiuddin* (1900) 27 Cal. 674.

(*o*) (1891) 19 Cal. 203, 219-220, *supra*.

(*p*) *Hussain Shah* v. *Gul Muhammad* (1925) Lah. 140, 88 I. C. 816 ('25)A.L. 420.

CHAPTER XIII.

PRE-EMPTION.

177. Pre-emption.—The right of *shufaa* or pre-emption is a right which the owner of an immoveable property possesses to acquire by purchase another immoveable property which has been sold to another person.

Hed., 547 ; Baillie, 475 ; *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775, 799.

"A right of pre-emption is not a right of re-purchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale under which he derives his title. A person, who chooses to pre-empt, therefore, must take upon him the burden of the obligations subject to which the sale was made as well as the benefits accruing therefrom. In other words, he can get no more than that for which the vendee bargained." *A* mortgages his property to *B* to secure repayment of Rs. 50. *A* then sells the property, subject to the mortgage, to *C* for Rs. 200. *D* claims the right to pre-empt by offering Rs. 200 to *C*. *C* accepts Rs. 200, and delivers possession of the property to *D*. *B* then sues *D* to enforce his mortgage. *D* contends that he had no notice of the mortgage when he claimed the right of pre-emption, and that he is not therefore bound to pay the mortgage-debt. This contention cannot be upheld, for *D* stands in the shoes of *C*, and *C*'s purchase was subject to *B*'s mortgage (*q*).

178. Law of pre-emption not applied in Madras Presidency.—The Mahomedan law of pre-emption is applied by the Courts of British India to Mahomedans as a matter of " justice, equity and good conscience," except in the Madras Presidency where the right of pre-emption is not recognised at all [unless by local custom as in Malabar (*r*)]. The reason given by the Madras High Court for refusing to recognise the right is that the law of pre-emption places a restriction upon liberty of transfer of property, and is therefore opposed to " justice, equity and good conscience " (*s*).

See notes to s. 5 above.

179. Special Acts.—The law of pre-emption in the Punjab is regulated by the Punjab Laws Act, 1872, as amended by Act XII of 1878, and in Oudh by the Oudh Laws Act, 1876. These acts apply to Mahomedans as well as non-

(*q*) *Tejpal* v. *Girdhari Lal* (1908) 30 All. 130.
(*r*) *Krishna Menon* v. *Kesavan* (1897) 20 Mad. 305.
(*s*) *Ibrahim* v. *Muni Mir Udin* (1870) 6 H. M. C. 26.

Mahomedans, with the result that the rules of the Mahomedan Law of Pre-emption do not apply even to Mahomedans in those places except on the footing of local custom (*t*).

180. Pre-emption among Hindus.—The right of pre-emption is recognized *by custom* among Hindus who are either natives of, or are domiciled in (*u*), Behar (*v*), and certain parts of Gujarat, such as Surat, Broach and Godhra (*w*), and it is governed by the rules of the Mahomedan Law of Pre-emption except in so far as such rules are modified by such custom (*x*).

Where the existence of any such custom is generally known and judicially recognized, it is not necessary to assert or prove it (*y*).

The explanation lies in the fact that under the Mahomedan law, non-Mahomedans are as much entitled to exercise the right of pre-emption as Mahomedans (Baillie, 477). Accordingly, during the Mahomedan rule in India, claims for pre-emption were entertained by the Courts of the country, whether they were preferred by or against Hindus, In this wise, the Mahomedan law of pre-emption came to be the customary law of Behar and Gujarat. But the law of pre-emption as applied to Hindus in those places was the Hanafi law, the Mahomedan sovereigns of India being Sunnis of the Hanafi sect, and the same law is now applied to them in cases of pre-emption. But it is a necessary condition of the application of the Mahomedan law of pre-emption to Hindus in Behar and Gujarat that they should be either natives of, or domiciled in, those places. It is not enough that the party is a Hindu and owns immoveable property in those places. Thus in a recent Calcutta case the right of pre-emption was denied to a Hindu who was a co-sharer of certain immoveable property in Behar, but who was neither a native of, nor domiciled in, that place (*z*). See notes to s. 180A below.

180A. Pre-emption by contract.—(*1*) Rights of pre-emption may be created by contract between the sharers in a village (*a*).

(*2*) A Mahomedan vendor may agree with a Hindu purchaser that the Mahomedan Law of pre-emption applying between the vendor and his co-sharer, also a Mahomedan, should be applicable to the purchase. Where such a contract is entered into, and the vendor informs his co-sharer about

(*t*) *Wilson's Digest of Anglo-Muhammedan Law*, s. 353.

(*u*) *Parsasth Nath* v. *Dhanai* (1905) 32 Cal. 988.

(*v*) *Fakir Rawot* v. *Emambaksh* (1863) Beng. L. R. Sup. Vol. 35; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I. A. 101, 15 I. C.659.

(*w*) *Gordhandas* v. *Prankor* (1869) 6 B. H. C. A. C. 263, read with *Dahyabhai* v. *Pandya* (1914) 38 Bom. 183, 185-188, 22 I. C. 289; *Jagjivan* v. *Kalidas* (1921) 45 Bom. 604, 60 I. C. 901 [Surat—as to houses only, and not agricultural lands]; *Gokaldas* v. *Partab* (1916) 18 Bom. L. R. 693, 35 I. C. 871 [Godhra]; *Mahomed* v. *Narein* (1916) 40 Bom. 358, 32 I. C. 933 [not in Khandesh] *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 649, 42 I.C. 32 [not in Kolaba]: *Motilal* v. *Harilal* (1920) 44 Bom. 696, 57 I. C. 590 [Ahmedabad]; *Ram Chand* v. *Goswami* (1923) 45 All. 501, 74 I. C. 379, ('23) A. A. 513 [Benares—as to houses only, and not agricultural lands].

(*x*) *Chakuuri* v. *Sundri* (1906) 28 All. 590; *Jai Kuar* v. *Heera Lal* (1874) 7 N. W. P. 1.

(*y*) *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575.

(*z*) *Parsasth Nath* v. *Dhanai* (1905) 32 Cal. 988.

(*a*) *Digambar Singh* v. *Ahmad* (1915) 37 All. 129 141, 42 I.A. 10, 18, 28 I. C. 34.

it, and the co-sharer makes the 'demands' as required by law [s. 186], he is entitled to pre-emption against the purchaser, though the purchaser may be a Hindu (*b*).

Introduction of the law of pre-emption into India.—In *Digamber Singh* v. *Ahmad* (*c*), their Lordships of the Privy Council said: "Pre-emption in village communities in British India had its origin in the Mahomedan Law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up and were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Mahomedan law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the share-holders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is as far as is possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved."

181. Who may claim pre-emption.—The following three classes of persons and no others, are entitled to claim pre-emption, namely:—

(1) a co-sharer in the property (*d*) [*shafi-i-sharik*];

(2) a participator in immunities and appendages, such as a right of way or a right to discharge water (*e*) [*shafi-i-khalit*]; and

(3) owners of adjoining immoveable property [*shafi-i-jar*], but not their *tenants* (*f*), nor persons in possession of such property without any *lawful title* (*g*) [Baillie, 481].

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed [Baillie, 500].

(*b*) *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 650-651, 42 I. C. 32.
(*c*) 37 All. 129, 140-141, 42 I.A. 10, 18, 28 I. C. 34.
(*d*) *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I. A. 101, 15 I. C. 659.
(*e*) *Karim* v. *Priyo Lal* (1905) 2 All. 127.
(*f*) *Gooman Singh* v. *Tripool Sing* (1867) 8 W. R. 437.
(*g*) *Beharee Ram* v. *Shoobudra* (1868) 9 W. R. 455.

The High Court of Calcutta has held that where there are three co-sharers in a property, and one of them sells his share to another, a third co-sharer has no right to claim pre-emption (*h*). But the right of pre-emption arises if the sale is by one co-sharer to another *and a stranger* (*i*). The Calcutta decisions proceed on the ground that the reason for allowing pre-emption is to prevent the inconvenience which may result from the introduction of a disagreeable stranger as a co-sharer or a neighbour, but no such annoyance can result from a sale by one co-sharer *to another co-sharer*. The Allahabad High Court has in recent cases dissented from the Calcutta rulings and held that even if the sale is made to a co-sharer alone who, if the share were sold to a stranger, would be entitled to pre-empt, other persons belonging to the same class are entitled to claim pre-emption against him (*j*). The High Court of Bombay has followed the Allahabad rulings (*k*).

Exception.—The right of pre-emption on the ground of *vicinage* does not extend to estates of large magnitude, such as villages and zemindaris, but is confined to houses, gardens, and small parcels of land (*l*). The right, however, may be claimed by a co-sharer (*m*).

[(a) *A*, who owns a piece of land, grants a building lease of the land to *B*. *B* builds a house on the land, and sells it to *C*. *A* is not entitled to pre-emption of the house, though the land on which it is built belongs to him, for he is not a co-sharer, nor a participator in the appendages of the house, nor an owner of *adjoining* property: *Pershadi Lal* v. *Irshad Ali* (1807) 2 N. W. P. 100.

(b) *A* owns a house which he sells to *B*. *M* owns a house towards the north of *A*'s house, and is entitled to a right of way through that house. *N* owns a house towards the south of *A*'s house, separated from *A*'s house by a party wall, and having a right of support from that wall. Both *M* and *N* claim pre-emption of the house sold to *B*. Here *M* is a participator in the appendages, while *N* is merely a neighbour, for the right of collateral support is not an appendage of property. *M* is therefore entitled to pre-emption in preference to *N*; see *Ranchoddas* v. *Jugaldas* (1899) 24 Bom. 414; *Karim* v. *Priyo Lal* (1905) 28 All. 127. It is immaterial that *M*'s right of way has not been perfected by prescription under the Easements Act. In such a matter the rules

(*h*) *Lalla Nowbat Lall* v. *Lalla Jewan Lall* (1879) 4 Cal. 831 [F. B.]

(*i*) *Saligram* v. *Raghubar* (1888) 15 Cal. 224.

(*j*) *Amir Hasan* v. *Rahim Bakhsh* (1897) 19 All. 466; *Abdullah* v. *Amanat-ullah* (1899) 21 All. 292; *Muhammad Yakub* v. *Kanhai Lal* (1922) 44 All. 83, 64 I. C. 673, ('22) A. A. 157, dissenting on this point from *Baldeo* v. *Badrinath* (1909) 31 All. 519; *Zia-ud-Din* v. *Abul* (1923) 45 All. 487, 77 I. C. 27; *Nadir* v. *Sadiq* (1925) 47 All. 324, 86 I. C. 589, ('25) A. A. 361.

(*k*) *Vithaldas* v. *Jamiatram* (1920) 44 Bom. 887, 58 I. C. 279 [F.B.]

(*l*) *Mahomed Hossein* v. *Mohsin Ali* (1870) 8 B. L. R. 41, 50; *Abdul Rahim* v. *Kharag Singh* (1892) 15 All. 104; *Munna Lal* v. *Hajira Jan* (1910) 33 All. 28, 7 I. C. 404.

(*m*) *Sitaram* v. *Sayad* (1917) 41 Bom. 636, 652-653, 42 I. C. 32; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I. A. 101, 15 I. C. 659, [Mahal]; *Said-ud-Din* v. *Latif-un-Nissa* (1922) 44 All. 114, 64 I. C. 456, ('22) A. A. 391 [Zemindari].

of Mahomedan law are to be applied, and that law does not prescribe any period which would give a person the right to enjoy an immunity, such as a right of way (n).

Note.—In the above illustration, the house owned by *M* is a dominant heritage, and the pre-empted house is a servient heritage, for *M* has a right of way through it. But *M* would not the less be a "participator in the appendages," if the pre-empted property was the dominant heritage and his property was the servient heritage: *Chand Khan* v. *Naimat Khan* (1869) 3 B. L. R., A. C. 296. And *M* would still be a "participator," if his house and the pre-empted house were both dominant tenements having a right of easement against a third property: *Mahatab Singh* v. *Ramtahal* (1868) 6 Beng. L. R., at p. 43.

(c) *A*, *B*, and *C* are co-sharers in a house. *A* sells his share to *B*. According to the Calcutta rulings *C* is not entitled to pre-empt. According to the Allahabad and Bombay rulings, *C* is entitled to pre-empt half of *A*'s share. The result would be the same if *B* and *C* were participators in appendages.]

Hed., 548-550; Baillie, 481-484, 500. The right of pre-emption cannot be resisted on the ground that the pre-emptor was not in possession of his own property at the date of the suit. It is *ownership*, and not *possession*, that gives rise to the right (o).

When pre-emption is claimed by two or more persons on the ground of participation in a right of way, all the pre-emptors have equal rights, although one of them may be a contiguous neighbour (p). The reason is that the Mahomedan law does not recognize degrees of nearness in the same class of pre-emptors (q). But nearness may be recognized by custom (r).

Villages and Zemindaries.—The reason why the right of pre-emption cannot be claimed when the contiguous estates are of large magnitude is that the law of pre-emption "was intended to prevent vexation to holders of *small* plots of land who might be annoyed by the introduction of a stranger among them." But this principle applies only when the right of pre-emption is claimed merely on the ground of *vicinage*. It does not apply where the right is claimed by a *co-sharer*. See the section.

Females.—A female is not precluded from maintaining a suit for pre-emption if she is by law entitled to inherit, even though it may be a widow's estate (s) But a female entitled to maintenance only is not entitled to pre-empt (t).

Shiah Law.—By the Shiah law the only persons entitled to the right of pre-emption are co-sharers: Baillie, Part II, 179; *Qurban* v. *Chote* (u), and that too if the number of co-sharers does not exceed two (v).

182. Sale alone gives rise to pre-emption.—The right of pre-emption arises only out of a valid (*w*), complete (*x*), and

(n) *Baldeo* v. *Badri Nath* (1909) 31 All. 519, 2 I. C. 458.
(o) *Sakina Bibee* v. *Amiran* (1888) 10 All. 472.
(p) *Karim Bakhsh* v. *Khuda Bakhsh* (1894) 16 All. 247.
(q) *Said-ud-Din* v. *Latif-iun-Nissa* (1922) 44 All. 114, 116-117, 64 I. C. 456, ('22) A. A. 391; *Nageshar* v. *Ram Harakh* (1924) 46 All. 870, 79 I. C. 417, ('24) A. A. 541.
(r) *Dhanraj* v. *Rameshwar* (1923) 46 All. 171, 78 I. C. 904, ('24) A. A. 227.
(s) *Ishar Devi* v. *Sheo Ram* (1924) 5 Lah. 435, ('25) A. L. 88, 84 I. C. 484.
(t) *Karan Singh* v. *Muhammad* (1885) 7 All. 860; *Bhupal* v. *Mohan* (1897) 19 All. 324.
(u) (1899) 22 All. 102.
(v) *Abbas Ali* v. *Maya Ram* (1889) 12 All. 229; *Husain Bakhsh* v. *Mahfuz-ul-Haq* (1925) 47 All. 944, 88 I. C. 972, ('25) A. A. 559.
(w) Hed., 560; Baillie, 475-477; *Najm-un-Nissa* v. *Ajaib Ali* (1900) 22 All. 343 [where the price was not ascertained at the date of the contract].
(x) Hed., 550; Baillie, 475-477.

bona fide (*y*) sale. It does not arise out of gift, sadaka (s. 144), wakf, inheritance, bequest (*z*), or a lease even though in perpetuity (*a*). Nor does it arise out of a mortgage even though it may be by way of conditional sale (*b*); but the right will accrue, if the mortgage is foreclosed (*c*). The right arises even if the property sought to be pre-empted is sold by an official receiver or by an order of the Court (*d*). A transfer of property by a husband to his wife in lieu of dower is a sale (*e*).

Explanation I.—According to the Mahomedan law a sale is an exchange of property for property with the mutual consent of the parties, the exchange consisting in payment of price by the purchaser to the vendor and delivery of possession by the vendor to the purchaser. The execution of an instrument of sale is not necessary (*f*). According to the Transfer of Property Act, 1882, s. 54, a sale of property of the value of Rs. 100 and upwards is not complete unless made by a registered instrument. It has been held by a Full Bench of the Allahabad High Court, that although the rules of the Mahomedan Law of Sale have been superseded by the provisions of the Transfer of Property Act, the question whether a sale is complete so as to give rise to the right of pre-emption is to be determined by applying the Mahomedan law, and if a complete sale is effected under that law as where the price is paid and possession is delivered, the right of pre-emption will arise, though the sale may not be complete under the Transfer of Property Act (*g*). On the other hand, some judges have expressed the opinion that the right of pre-emption does not arise until after registration as required by the Transfer of Property Act (*h*). In *Jadu Lal* v. *Janki Koer* (*i*), Brett, J., suggested that a solution of the problem was to be found in determining in each case what was the intention of the parties as to the date when the sale should be considered as complete. The rule suggested by Brett., J., was adopted by some judges in Calcutta (*j*) and Patna (*k*)

(*y*) *Parsashth Nath* v. *Dhanai* v. (1905) 32 Cal. 989.
(*z*) Baillie, 471.
(*a*) *Dewanuttualla* v. *Kazem Molla* (1887) 15 Cal. 184.
(*b*) *Gurdial* v. *Teknarayan* (1865) B. L. R. Sup. Vol. 166.
(*c*) *Batul Begum* v. *Mansur Ali* (1901) 24 All. 17.
(*d*) *Brij Narain* v. *Kedar Nath* (1923) 45 All. 186.
(*e*) *Fida Ali* v. *Muzaffur Ali* (1882) 5 All. 65; *Nathu* v. *Shadi* (1915) 37 All. 522, 29 I. C. 495, doubted by Mr. Ameer Ali, Vol. 1. (3rd ed.), p. 587, f. n. (1).
(*f*) Hedaya, 241; Macnaghten, 42; Baillie, 476; *Begam* v. *Muhammad* (1894) 16 All. 344, 346-348.
(*g*) *Begam* v *Muhammad* (1894) 16 All. 344 [F. B.], *Najm-un-Nissa* v. *Ajaib Ali* (1900) 22 All. 343; *Janki* v. *Girjadat* (1885) 7 All. 482 [F. B.]
(*h*) Banerji, J., in 16 All. 344, 356, *supra*: Carnduff, J., in *Budhai* v. *Sonaullah* (1914) 41 Cal. 943, 949, 23 I. C. 395; Mullick, J., in *Kheyali* v. *Mullick* (1916) 1 Pat. L. J., 174, 177-178, 34 I. C. 210.
(*i*) (1908) 35 Cal. 575, 599, *affmd.* in 39 Cal. 915, 39 I. A. 101, 15 I. C. 659.
(*j*) Richardson, J., in (1914) 41 Cal. 943, 953, 23 I. C. 385, *supra*.
(*k*) Roe, J., in (1916) 1 Pat. L. J. 174, 179, 34 I. C. 210, *supra*.

and also by the High Court of Bombay in *Sitaram* v. *Sayad Sirajul* (*l*). The decision of the Bombay Court in *Sitaram's case* was affirmed on appeal by the Judicial Committee. In the course of the judgment their Lordships of the Privy Council said: "You are to look at the intention of the parties [that is, the vendor and the vendee] in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale with reference to which the ceremonies were performed" (*m*). In a later case the High Court of Bombay followed the Full Bench decisions of the Allahabad High Court (*n*).

Explanation II.—It has been held by the High Court of Allahabad that the right of pre-emption arises not only when an out-and-out sale has been completed, but also when a complete contract of sale, without any option to the vendor, has been made (*o*).

The importance of the question now under consideration arises in this way. A Mahomedan is not entitled to pre-emption unless he makes the "demands" required by law (s. 186). These demands should not be made before the sale is complete. They should be made after the sale is complete, and immediately after the pre-emptor hears of the sale, that is, a completed sale. Now a sale according to the Mahomedan law is completed by payment of the price by the purchaser to the vendor and by delivery of possession by the vendor to the purchaser. But a sale under the Transfer of Property Act is not complete unless made by a registered instrument. Hence the view taken by some Judges that the 'demands' should be made after *registration* of the sale-deed. But if this view be accepted, the vendor and vendee, with a view to defeat the pre-emptor, may not execute and register a sale-deed, and may complete the transaction by payment of price and delivery of possession so as to deprive the pre-emptor of the right of pre-emption. Hence the rule suggested by Brett, J., and approved by the Judicial Committee, namely, to ascertain in each case what was the intention of the parties as to the date when the sale should be considered as completed.

A agrees to sell his house to *B* in January 1918 for Rs. 300. On 1st February 1918 *B* pays the purchase-money to *A*, and obtains possession of the house from *A*. The sale-deed is registered on 1st March 1918. The pre-emptor comes to know of the payment of price and delivery of possession on 15th February 1918, but he does not make the "demands" (s. 186) until 2nd March 1918, being the date on which he first comes to know of the registration. Is he entitled to pre-emption? (1) No, according to the Allahabad High Court (*p*), for the sale, according to that Court, became complete on payment of the price and delivery of possession, and the pre-emptor having failed to make the "demands" on 15th February when he first came to know of it, the right of pre-emption is lost by delay. (2) If the sale be regarded as complete on *registration*, the pre-emptor is entitled to pre-emption, for he made the 'demands' when he first came to

(*l*) (1917) 41 Bom. 636, 651-652, 42 I. C. 32, followed in *Abdulla* v. *Ismail* (1921) 46 Bom. 302, 64 I. C. 913.

(*m*) *Sitaram* v. *Jiaul Hasan* (1921) 45 Bom. 1056, 48 I. A. 475, 64 I. C. 826.

(*n*) *Abdulla* v. *Ismail* (1922) 46 Bom. 302, 64 I. C. 913, ('22) A. B. 124.

(*o*) *Zamini Begam* v. *Khan Muhammad* (1924) 46 All. 142, 81 I. C. 586, ('24) A. A. 251, follg. (1894) 16 All. 344, 347.

(*p*) (1894) 16 All. 344.

know of the registration. In fact, if he had made the 'demands' *before* registration, they would have been premature, and he would not have been entitled to pre-emption unless he made the "demands" again immediately *after* he came to know of registration. (3) According to the rule now laid down by the Judicial Committee, the intention of the parties is the sole guide. Therefore, if in the case put above, possession was not given and no part of the price was paid till registration, the intention of the parties would be taken to be that they did not regard the sale to be complete till registration, and the 'demands' in such a case should be made immediately after the pre-emptor hears of the registration (*q*). But if the contract of sale says, "I have agreed to sell you my share for Rs. 29,000, Rs. 1,000 paid down, and the remainder payable in two quick instalments, and that a formal deed of sale shall be executed and registered," and the agreement further contemplates a notice of the transaction to be given by the vendor to his co-sharer on the same day, and provides that if the co-sharer elects to purchase the vendor's share, the vendor should immediately return the Rs. 1,000 to the purchaser, it is the date of the agreement that is to be taken as the date of the sale and it is with reference to that date that the co-sharer (pre-emptor) should perform the necessary ceremonies (*r*).

Lease in perpetuity.—A lease even though in perpetuity does not give rise to the right of pre-emption. But a transaction, though in form a lease, may in truth and substance be a sale, as where the property is of the value of Rs. 2,000, and a lease is given for 99 years under which Rs. 1,950 are paid as premium and Re. 1 is reserved as annual rent. In such a case the pre-emptor is entitled to pre-emption, though the transaction is in form a lease. The Mahomedan law does not recognise the device of dressing up a transaction of sale in the garb of a lease so as to defeat the right or pre-emption (*s*). See s. 192 below.

183. Ground of pre-emption to continue up to decree.—The right in which pre-emption is claimed—whether it be co-ownership, or participation in appendages, or vicinage—must exist not only at the time of sale, but at the date of the suit for pre-emption (*t*), and it must continue up to the time the decree is passed (*u*). But it is not necessary that the right should be subsisting at the date of the execution of the decree (*v*), or at the date of the decree of the appellate Court (*w*). The reason is that the crucial date in these cases is the date of the decree of the Court of first instance (*x*).

Thus if a plaintiff, who claims pre-emption as owner of a contiguous property, sells his property to another person *after institution of the suit*, he will not be entitled to a *decree*, for he does not then belong to any of the three classes of persons to whom the right of pre-emption is given by law: see s. 181 above. But once the *decree* is passed, the plaintiff does not forfeit the right of being put into possession of the pre-empted property in execution of the decree, although he may have alienated his property

(*q*) 35 Cal. 575; 41 Cal. 943, 950, 954, 23 I. C., 385.

(*r*) (1921) 45 Bom. 1056, 48 I. A. 475, 64 I. C. 826, *supra*.

(*s*) *Muhammad* v. *Muhammad* (1918) 40 All. 322, 44 I. C. 227.

(*t*) *Janki Prasad* v. *Ishar Das* (1899) 21 All. 374.

(*u*) *Ram Gopal* v. *Piari Lal* (1899) 21 All. 441; *Tafazzul* v. *Than Singh* (1910) 32 All. 567, 6 I. C. 426; *Nuri Mian* v. *Ambica Singh* (1917) 44 Cal. 47, 34 I. C. 869.

(*v*) *Ram Sahai* v. *Gaya* (1884) 7 All. 107.

(*w*) *Baldeo Misir* v. *Ram Lagan* (1923) 45 All. 709, ('24) A.A. 82, 77 I. C. 694; *Umrao* v. *Lachhman* (1924) 46 All. 321, 79 I. C. 217, ('24) A.A. 448.

(*x*) (1923) 45 All. 709, 710, 77 I. C. 694, ('24) A.A. 82, *supra*.

before execution or alienated it before the date of the decree of the appellate Court. It need hardly be mentioned that a plaintiff does not forfeit his right of pre-emption merely because he had on a previous occasion mortgaged his own property on which his right of pre-emption is based (y).

184. Doubt as to whether buyer should be a Mahomedan.—According to the Allahabad decisions, it is not necessary to enforce the right of pre-emption, that the buyer should be a Mahomedan (z). According to the Calcutta (a) and Bombay (b) decisions it is necessary, except in the cases mentioned in ss. 180 and 180A, that the buyer should be a Mahomedan. But all the three Courts are agreed that the seller and the pre-emptor should both be Mahomedans (c).

There are no Madras decisions, because in Madras the law of pre-emption is not applied even as between Mahomedans [s. 178].

The vendor should be a Mahomedan. Hence no right of pre-emption can be claimed by a Mahomedan when the vendor is a Hindu or a European, though the vendee may be a Mahomedan.

The pre-emptor also should be a Mahomedan, the reason being that if he is a Mahomedan and subsequently wants to sell the pre-empted property, he is bound to offer it to his Mahomedan neighbours or partners before he can sell it to a stranger. But a non-Mahomedan is not subject to any such obligation, and he can sell to any one he likes. The law of pre-emption contemplates both a right and an obligation, and if a non-Mahomedan were allowed to pre-empt, it would be allowing him the right without the corresponding obligation. This is the principle underlying the decision of the Allahabad High Court in *Qurban's* case (d), where it was held that a Shiah Mahomedan could not maintain a claim for pre-emption based on the ground of *vicinage* when the vendor is a Sunni. The decision was based on the ground that by the Shiah law a *neighbour* as such has no right of pre-emption, and that if he were allowed to pre-empt, he might sell his house to any one he liked, and his Sunni neighbours could not successfully assert any right of pre-emption against him.

The vendee also, according to the Calcutta High Court, should be a Mahomedan. Hence a Mahomedan cannot obtain pre-emption of property sold by a Mahomedan to a *Hindu*. According to that decision, the right of pre-emption is not a right that attaches to the land, but is merely a personal right. If it were a right attaching to the *land*, it might be claimed, even against a Hindu or any other non-Mahomedan purchaser. "We cannot, . . . in justice, equity and good conscience, decide that a Hindu purchaser in a district in whch the custom of pre-emption does not prevail as amongst Hindus, is bound by the Mahomedan law, which is not his law, to give up what he has purchased to a Mahomedan pre-emptor." On the other hand, it has been held by the

(y) *Ujagar Lal* v. *Jia Lal* (1896) 18 All. 382.
(z) *Gobind Dayal* v. *Inayatulla* (1885) 7 All. 775; *Abbas Ali* v. *Maya Ram* (1889) 12 All. 229.
(a) *Kudratulla* v. *Mahini Mohan* (1869) 4 Beng. L. R. 134.
(b) *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 649-650, 42 I. C. 32; *Mahomed* v. *Narain* (1916) 40 Bom. 358, 32 I. C. 933.
(c) *Dwarka Dass* v. *Hassain Bakhsh* (1878) 1 All. 564 (Hindu vendor); *Poorno Singh* v. *Hurrychurn* (1872) 10 B. L. R. 117 (European vendor); *Qurban* v. *Chote* (1899) 22 All. 102 (Shiah pre-emptor against Sunni vendor and Sunni vendee).
(d) (1899) 22 All. 102.

Allahabad High Court that it is not necessary that the vendee should be a Mahomedan, and that pre-emption can therefore be claimed even against a *Hindu* purchaser. According to that Court, a Mahomedan owner of property is under an obligation imposed by the Mahomedan law to offer the property to his Mahomedan neighbours or partners before he can sell it to a stranger, and this is an incident of his property which attaches to it whether the vendee be a Mahomedan or a non-Mahomedan. The Bombay High Court has adopted the view taken by the High Court of Calcutta. According to the Calcutta and Bombay High Courts, the right of pre-emption may be enforced against a Hindu vendee, in those cases only where the right is recognised by custom as stated in s. 180, or is created by contract as stated in s. 180A.

185. Pre-emption in case of sale to a shafee.—When the sale is made to one of several *shafees* (persons entitled to pre-empt), the other *shafees* are not entitled, according to the decisions of the Calcutta High Court, to claim pre-emption against him. But when the sale is made to a *shafee* and a stranger, and the property sold is conveyed to them both as a whole for one entire consideration, the other *shafees* (who, of course, must belong to the same class as the *shafee*-purchaser) are entitled to claim pre-emption of the whole share sold as if the whole was sold to the stranger alone [ills. (a) and (b)].

The same rule was followed by the High Court of Allahabad up to the year 1896, but in recent cases [ill. (c)] it has been held by that Court that even when the sale is made to a *shafee* alone, the other *shafees are* entitled to claim pre-emption of their share against him.

The High Court of Bombay has followed the recent Allahabad decisions in preference to the Calcutta decisions (*e*).

Calcutta Decisions.

[(a) *A*, *B* and *C* are co-sharers in certain lands. *A* sells his share to *B*. *C* has no right to claim pre-emption as to the whole or any part of the share sold : *Lalla Nowbut Lall* v. *Lalla Jevan Lall* (1878) 4 Cal. 831.

(b) *A*, *B* and *C* are co-sharers in certain lands. *A* sells his share at Rs. 1,000 to *B* and *S*. It is declared in the sale-deed that two-thirds of the share is to be for *B*, and one-third for *S*. *C* is entitled to claim pre-emption of the whole share sold by *A*, and not only of the one-third declared to be for *S* : *Saligram* v. *Raghubardyall* (1887) 15 Cal. 224. [Though the shares are here defined, the amount of purchase-money contributed by each vendee is not. If the price paid by each had been specified, *C* (it seems) would only be entitled to claim pre-emption of the one-third sold to *S* by offering to pay the price paid by him.]

(*e*) *Vithaldas* v. *Jametram* (1920) 44 Bom. 887, 58 I.C., 279 [F. B.]—a case from Bulsar.

Allahabad Decisions.

(c) *A, B, C* and *D* own each a house situate in a private lane common to all the four houses. *A* sells his house to *B*. Here *B, C* and *D* are "participators in the appendages" of the house sold, the appendage being the right of way, and *C* and *D* are each entitled to claim pre-emption of a third of the house, even though the sale is made to the *shafee B* alone without any stranger being associated with him: *Amir Hasan* v. *Rahim Baksh* (1897) 19 All. 466: *Abdullah* v. *Amanat-ullah* (1899) 21 All. 292.

The decisions referred to in the section are set out in the illustrations. The ground of the Calcutta decisions may be thus stated in the words of Garth, C.J.: "The object of the rule (of pre-emption) . . . is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour. But it is obvious that no such annoyance can result from a sale by one co-parcener to another." The recent Allahabad decisions proceed upon the broad ground that the rule laid down in the Hedaya, that "when there is a plurality of persons entitled to the privilege of *shuffa*, the right of all is equal", applies as much when the sale is made to a *shafee* as when it is made to a stranger (*f*).

186. Necessary formalities to be observed. No person is entitled to the right of pre-emption unless—

(1) he has declared his intention to assert the right *immediately* on receiving information of the sale. This formality is called *talab-i-mowasibat* (literally, demand of jumping, that is, immediate demand); and unless

(2) he has with the least practicable delay affirmed the intention, referring expressly to the previous *talab-i-mowasibat* (*f*), and made a formal demand—

(a) either in the presence of the buyer or the seller, or on the premises which are the subject of sale (*h*), and

(b) in the presence of witnesses *specifically* called to bear witness to the demand being made (*g*). This formality is called *talab-i-ishhad* (demand with invocation of witnesses).

Explanation I.—The *talab-i-mowasibat* should be made after the sale is completed. It is of no effect if made prior to the completion of the sale [s. 182].

(*f*) *Rajjab Ali* v. *Chundi Churn* (1890) 17 Cal. 54; *Mubarak Hussain* v. *Kaniz Bano* (1904) 27 All. 160; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 923, 39 I. A. 101, 108, 15 I. C. 659, *affmg.* (1908) 35 Cal. 576.

(*g*) *Kulsum Bibi* v. *Faqir Muhammad* (1896) 18 All. 298; *Muhammad Usman* v. *Muhammad Abdul* (1912) 34 All. 1, 11 I. C. 819.

(*h*) *Ganga Prasad* v. *Ajudhia* (1905) 28 All. 24; *Mubarak Husain* v. *Kaniz Banoo* (1904) 27 All. 160; *Sadiq Ali* v. *Abdul* (1923) 45 All. 290, 71. I. C. 460, ('23) A.A. 251.

Explanation II.—It is not necessary that the *talab-i-mowasibat* or *talab-i-ishhad* should be made by the pre-emptor in person. It is sufficient if it is made by a manager or duly authorised agent of the pre-emptor (*i*). When the pre-emptor is at a distance, it may be made by means of a letter (*j*).

Explanation III.—If the *talab-i-ishhad* is made in the presence of the buyer, it is not necessary that the buyer should then be actually in possession of the property in respect of which pre-emption is claimed (*k*).

Explanation IV.—When the *talab-i-ishhad* is made neither in the presence of the vendor nor on the property sought to be pre-empted, but in the presence of the buyer, then if there are two or more buyers, the demand should be made in the presence of all (*l*).

Explanation V.—No particular formula is necessary either for the performance of *talab-i-mowasibat* or *talab-i-ishhad* so long as the claim is unequivocally asserted (*m*).

Hed., 550, 551; Baillie, 487-490. The *talab-i-mowasibat* and the *talab-i-ishhad* are conditions precedent to the exercise of the right of pre-emption (*n*). The *talab-i-ishhad* is as indispensable as the *talab-i-mowasibat* (*o*). It is stated in the Hedaya (p. 550) that "the right of *shuffa* (pre-emption) is but a feeble right, as it is the disseising of another of his property merely in order to prevent apprehended inconveniences" (see notes to s. 185 above) Hence the formalities must be strictly complied with, and there must be a clear proof of the observance of those formalities (*p*). A petition by the pre-emptor to the sub-registrar praying that the registration of the sale-deed may be stayed cannot be treated as a *talab-i-mowasibat*, there being no assertion of the right of pre-emption (*q*). The *talab-i-mowasibat* should be made as soon as the fact of the sale is known to the claimant. Any unreasonable or unnecessary delay will be construed as an election not to pre-empt (*r*). A delay of twelve hours was held in an Allahabad case to be too long (*s*). And it was held in a Calcutta case that where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, took out Rs. 47-4" (evidently to tender the amount to the buyer), and then performed the *talabi-i-mowasibat*, he was not entitled to claim pre-emption, for the delay was quite unnecessary (*t*) [s.187].

(*i*) *Abadi Begum* v. *Inam Begam* (1877) 1 All. 521; *Ali Muhammad* v. *Muhammad* (1896) 18 All. 309; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I. A 101, 15 I. C. 659; *Harihar* v. *Sheo Prasad* (1884) 7 All. 41 [pre-emptor bound by acts and omissions of his agents.]

(*j*) *Syed Wajid* v. *Lalla Hanuman* (1869) 4 Beng. L.R., A.C. 139; *Muhammad* v. *Muhammad* (1916) 38 All. 201, 33 I. C. 349.

(*k*) *Ali Muhammad* v. *Mahammad* (1896) 18 All. 309.

(*l*) *Aliman* v. *Ali Husain* (1923) 45 All. 449, 73 I. C 1029, ('23) A. A. 355.

(*m*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982; *Muhammad Nazir* v. *Makhdum* (1912) 34 All. 53, 11 I. C. 737.

(*n*) *Deonandan Prashad* v. *Ramdhari* (1917) 44 Cal. 675, 683, 44 I. A. 80, 82, 39 I. C. 958.

(*o*) *Muhammad* v. *Madho Prasad* (1917) 39 All. 133, 35 I. C. 911.

(*p*) *Jadu Singh* v. *Rajkumar* (1870) 4 B. L. R. A. C. 171.

(*q*) *Kheyali* v. *Mullick* (1916) 1 Pat. L. J. 174, 34 I. C. 210.

(*r*) *Baijnath* v. *Ramdhari* (1908) 35 Cal. 402, 35 I. A. 60.

(*s*) *Ali Muhammad* v. *Taj Muhammad* (1876) 1 All. 283.

(*t*) *Jarfan Khan* v. *Jabar Meah* (1884) 10 Cal. 383.

It is not necessary to the validity of *talab-i-mowasibat* that it should be performed in the presence of witnesses. It is enough if the pre-emptor makes known his intention in some way. But it is of the essence of *talab-i-ishhad* that it should be performed before witnesses (*u*). It is also necessary when the *talab-i-ishhad* is made that the pre-emptor should refer expressly to the fact of the *talab-i-mowasibat* having been previously made and call the attention of the witnesses to that fact, and this necessity is not removed by the fact that the *talab-i-mowasibat* was also performed in the presence of witnesses and that the witnesses to the *talab-i-ishhad* are the same (*v*). The *talab-i-ishhad*, however, may be combined with the *talab-i-mowasibat*. Thus if at the time of *talab-i-mowasibat*, the pre-emptor had an opportunity of invoking witnesses *in the presence of the seller or the buyer or on the premises* to attest the *talab-i-mowasibat*. and witnesses were in fact invoked to attest it, it would suffice for both the *talabs* (demands), and there would be no necessity for another *talab-i-ishhad*. This, however, is the only case in which the *talab-i-ishhad* may be combined with the *talab-i-mowasi-bat* (*w*).

The *talab-i-mowasibat* may be made by using some such words as "I do claim my *shuffa*" (right of pre-emption) [Hed., 551]. The *talab-i-ishhad* may be made by the pre-emptor saying, "such a person has bought such a house of which I am the *shafee*; I have already claimed my privilege of *shuffa*, and now again claim it: be therefore witness thereof" [Hed., 551]. But no particular form is necessary [Hed., 551]; what the law requires is that the demand must be to that effect and no more. It has thus been held that the requirements of a *talab-i-ishhad* are complied with, if the pre-emptor states in the presence of the vendor, or the vendee, or on the land sold, *and* in the presence of witnesses, "I *have* claimed pre-emption; *I still* claim it; *bear witness* therefore to the fact" (*x*). If there are several purchasers, it is not necessary that the names of *all* the purchasers should be enumerated at the time either of the first or the second demand. Thus where a pre-emptor claimed the right of pre-emption against five purchasers, and the form used was "whereas Jagdeb Singh *and others* have purchased the property and I have claimed pre-emption," etc., and this was proclaimed in the presence of two of the purchasers and at the empty doors of the other three, it was held that the demand was properly made, and that there was nothing equivocal in the formulation of the claim (*y*).

Explanation I.—See s. 182, Expln. II and notes thereto.

186A. Transfer of property by purchaser after demands.—When once a pre-emptor has made the "demands" required by law [s. 186], a transfer by the purchaser of the property sought to be pre-empted will not affect the rights of the pre-emptor, and the pre-emptor is not bound to make fresh "demands" against the transferee (*z*).

187. Tender of price not essential.—It is not necessary to the validity of a claim of pre-emption that the pre-emptor

(*u*) *Jadu Singh* v. *Rajkumar* (1870) 4 B. L. R., A. C. 171.

(*v*) *Mubarak Husain* v. *Kaniz Bano* (1904) 27 All. 160; *Sadiq Ali* v. *Abdul* (1923) 45 All. 290, 71 I. C. 460, ('23) A. A. 251.

(*w*) Baillie 490; *Nathu* v. *Shadi* (1915) 37 All. 522; 29 I. C. 495; *Rajjab Ali* v. *Chundi Churn* (1890) 17 Cal. 543 [F. B.]; *Nundo Pershad* v. *Gopal* (1884) 10 Cal. 1008, relied upon in 37 All. 522, 29 I. C. 495, was overruled in 17 Cal. 543 (F. B.)

(*x*) Macnaghten, p. 183.

(*y*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982.

(*z*) *Mahammad Abdul* v. *Muhammad* (1924) 46 All. 889, 79 I. C. 1053, ('24) A.A. 806.

should tender the price at the time of the *talab-i-ishhad* [sec. 186]; it is sufficient that he should then declare his readiness and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale deed is fictitious, such sum as the Court determines to have been actually paid by the buyer (*a*).

188. Death of pre-emptor.—If the pre-emptor dies pending the suit for pre-emption, the suit may be continued by his legal representatives.

A sues *B* for pre-emption. *A* dies *before* obtaining a decree in the suit. According to the Hanafi law, the right to sue is extinguished, and the suit cannot be prosecuted by *A*'s *heirs* (*b*). According to the Shiah and the Shafei law, the right to sue is not extinguished, and the suit may be continued by *A*'s *heirs* [Baillie, II, 190; Hed. 561]. According to the Probate and Administration Act, 1881, s. 89 [now Indian Succession Act 39 of 1925, s. 306], the right is not extinguished, and the suit may be continued by *A*'s legal representative, that is, his *executor or administrator*. That Act applies to Mahomedans, and the effect of a recent Bombay decision is that whatever be the sect to which the parties belong, the rule applicable to cases of this kind is that laid down in the said Act, that is to say, if *A* dies leaving a will the suit may be continued by his *executor*, and if he dies intestate it may be continued by his heirs *on obtaining letters of administration* (*c*).

189. Right lost by acquiescence.—The right of pre-emption is lost if the pre-emptor enters into a compromise with the buyer, or if he otherwise acquiesces in the sale (*d*). But a mere offer by a pre-emptor to purchase from the buyer at the sale-price, made with the object of avoiding litigation, does not amount to acquiescence (*e*).

190. Right not lost by refusal of offer before sale.—As the right of pre-emption accrues *after* the completion of the sale, it is not lost by a refusal to purchase when the offer is made to the pre-emptor *before* the completion of the sale (*f*).

191. Suit for pre-emption.—Every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer (*g*).

(*a*) Baillie, 494, *Heera Lall* v. *Moorut Lall* (1869) 11 W. R. 275; *Lajja Prasad* v. *Debi Prasad* (1880) 3 All 236; *Nundo Parshad* v. *Gopal* (1884) 10 Cal. 1008, *Karim Baksh* v. *Khuda Buksh* (1894) 16 All. 247, 248 See *Jagat Singh* v. *Baldeo Prasad* (1921) 43 All 137, 59 I. C. 679 [sale to mortgagee].

(*b*) *Baillie*, I *pp*. 505-506; *Muhammad Husain* v. *Niamat-un-nissa* (1897) 20 All. 88.

(*c*) *Sayyad Jiaul Hussan* v. *Sitaram* (1912) 36 Bom. 144, 12 I. C. 720 [Shafei], *Sitaram* v. *Syad Sirajul* (1917), 41 Bom. 636, 653, 42 I C. 32, affd. on app. to. P. C. in *Sitaram* v. *Jiaul Hasan* (1921) 45 Bom. 1056, 1061 48 I. A 475, 479 64 I. C. 826 See also Code of Civil Procedure, 1908, O. 22, r. 1.

(*d*) *Habib-un-nissa* v. *Barkat Ali* (1886) 8 All 275. *Amir Haidar* v. *Ali Ahmad* (1925) 47 All 635, 88 I C. 234, ('25) A A. 424 [minor]

(*e*) *Muhammad Nasir-ud-din* v. *Abdul Ha* (1894) 16 All. 300; *Muhammad Yunnus* v. *Muhammad Yusuf* (1897) 19, All 334.

(*f*) *Abadi Begum* v. *Inam Begum* (1877) 1 All. 521, *Kanhai Lal* v. *Kalka Prasad* (1905 27 All. 670.

(*g*) *Durga Prasad* v. *Munsi* (1884) 6 All 423.

The principle of denying the right of pre-emption except as to the whole of the property sold is that if the pre-emptor were allowed to split up the bargain, he would be at liberty to take the best portion of the property and leave the worst part of it with the vendee (*h*). "The right of pre-emption was never intended to confer such a capricious choice upon the pre-emptor" (*i*). But where the purchaser himself sells part of the property to another, the pre-emptor is entitled to pre-emption in respect of that portion which remains with the purchaser (*j*).

Limitation.—A suit to enforce the right of pre-emption must be instituted within one year from the date when the purchaser takes physical possession of the property, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered (Limitation Act, 1908, sch. I, art. 10). If the subject of sale does not admit of physical possession and there is no registered instrument, the suit will be governed not by art. 10, but by art. 120 (*k*). When the person entitled to pre-emption is a minor, the right may be claimed on his behalf by his guardian, but the suit must be instituted within the aforesaid period, and the period of limitation will not be extended by reason of the pre-emptor's minority [Limitation Act, s. 8].

When pre-emptor vested with rights of vendee.—See Code of Civil Procedure, 1908, O. 20, r. 14. Upon a pre-emption decree the property, and the right to mesne profits therefrom, vest in the pre-emptor only from the date when he pays the amount of the purchase price finally decreed; until that time, the original purchaser retains possession and is entitled to the rents and profits (*l*).

191A. Decree for pre-emption not transferable.—A decree for pre-emption is not transferable so as to entitle the transferee to obtain possession of the property in suit in execution of the decree (*m*).

192. Legal device for evading pre-emption.—When it is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property excluding a portion, however small, immediately bordering on the neighbour's property, and thus defeat the neighbour's right of pre-emption.

Hed., 563; Baillie, 512, *et seq.* Fabrication is not one of the devices permissible under the Mahomedan law for defeating the right of pre-emption (*n*). See notes to s. 182, "Lease in perpetuity."

193. Sect-law as governing pre-emption.—(*1*) If both the vendor and pre-emptor are Sunnis, the right of pre-emption

(*h*) *Sheobharos* v. *Jiach Rai* (1886) 8 All. 462.
(*i*) *Durga Prasad* v. *Munsi* (1884) 6 All. 423, at p. 426.
(*j*) *Ude Ram* v. *Atma Ram* (1924) 5 Lah. 80, 80 I.C. 960, ('24) AL. 431.
(*k*) *Batul Begam* v. *Mansur Ali* (1901) 24 All. 17; *Haunsilla* v. *Gopal* (1906) All. W. N. 73.
(*l*) *Deokinandan* v. *sri Ram* (1889) 12 All. 234; *Deonandan Prashad* v. *Ramdhari* (1917) 44 Cal. 675, 44 I. A. 80, 39 I.C. 958.
(*m*) *Ramasahai* v. *Gayu* (1884) 7 All. 107, 111; *Nadir Ali* v. *Wali* (1924) 5 Lah. 486, 85, I. C. 182, ('25) AL. 202; *Mehr. Khan* v. *Ghulam* (1921) 2 Lah. 282, 64 I. C. 191.
(*n*) *Jadu Lal* v. *Janki Koer* (1908) 35 Lal. 575, affmd. in (1912) 39 Cal. 915, 39 I. A. 101, 15 I. C. 659.

is to be determined according to the Sunni law, and if both the parties are Shiahs (*o*), the right of pre-emption is governed by the Shiah law (*p*).

(*2*) If the vendor is a Sunni, and the pre-emptor is a Shiah, the right of pre-emption is, according to the Allahabad High Court, governed by the Shiah law, on the principle of reciprocity explained in the notes to sec. 184 above (*q*).

(*3*) If the vendor is a Shiah, and the pre-emptor is a Sunni, then, according to the Allahabad High Court, the right of pre-emption is governed by the Shiah law (*r*); but according to the Calcutta High Court, it is governed by the Sunni law (*s*).

(*4*) The personal law of the buyer is immaterial in these cases (*t*).

193A. Points of distinction between the Sunni and the Shiah law of pre-emption.—(*1*) According to the Shiah law, no right of pre-emption exists in the case of property owned by *more than two* co-sharers (*u*).

(*2*) The Shiah law does not recognize the right of pre-emption on the ground of *vicinage* (*v*), or on the ground of "participation in the appendages."

Baillie, Part II, 175-179. *A*, a Sunni, sells his land to *B*. *A*'s neighbour *C*, who is a Shiah, sues *A* and *B* for pre-emption. According to the Allahabad High Court, the law to be applied is the Shiah law, and under that law a *neighbour* as such has no right of pre-emption. *C* is not therefore entitled to pre-empt. But if we deny *C* the right to pre-empt by applying his own law [Shiah law] to him it is but fair that when *C* sells his own property, we should apply the same law, so that if his *neighbour* is a Sunni and he claims the right of pre-emption on the ground of *vicinage*, we should not allow his Sunni *neighbour* the right of pre-emption. This is the line of reasoning followed by the Allahabad High Court in the cases referred to in sub-secs. (2) and (3). The tendency of the Calcutta High Court is to apply in all cases the Sunni law of pre-emption except perhaps in cases where both the vendor and pre-emptor are Shiahs. The reason given by that Court is that the law of pre-emption in force in this country is the Sunni law of pre-emption.

(*o*) See *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775.
(*p*) *Abbas Ali* v. *Maya Ram* (1888) 12 All. 229.
(*q*) *Qurban* v. *Chote* (1899) 22 All. 102.
(*r*) *Pir Khan* v. *Faiyaz* (1914) 36 All. 488, 25 I.C. 445.
(*s*) *Jog Deb.* v. *Mahomed* (1905) 32 Cal. 982.
(*t*) *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775; *Jog Deb.* v. *Mahomed* (1905) 32 Cal. 982. But see *Kudratullah* v. *Mahini Mohun* (1869) 4 B.L.R. 184.
(*u*) *Abbas Ali* v. *Maya Ram* (1889) 12 All. 229; *Husain Bakhsh* v. *Mahfuz-ul-Haq* (1925) 47 All. 944, 88 I. C. 972, ('25) A. A. 559.
(*v*) *Qurban* v. *Chote* (1899) 22 All. 10

CHAPTER XIV.

MARRIAGE, DOWER, DIVORCE AND PARENTAGE.

A.—MARRIAGE.

194. Definition of Marriage.—Marriage (*nikah*) is defined to be a contract which has for its object the procreation and the legalising of children.

Hed., 25; Baillie, 4.

Muta or temporary marriage.—The Shiah law recognizes two kinds of marriages, namely, (1) permanent, and (2) *muta* or temporary (s. 206 B). The Sunni law does not recognize *muta* marriage at all (Baillie, 18).

195. Capacity for Marriage.—(*1*) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

(*2*) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians [ss. 207-211].

Explanation.—Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

Baillie, 4; Hed., 529. Note that the provisions of the Indian Majority Act, 1875, do not apply to matters relating to *marriage, dower,* and *divorce*. See notes to s. 101 above.

When consent to a marriage is obtained by force or fraud, such marriage is invalid unless ratified (*w*).

196. Proposal and acceptance before witnesses.—It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage.

(*w*) *Abdul Latif* v. *Niyaz Ahmed* (1909) 31 All. 343, 1 I.C. 538 [wife's illness concealed]; *Kulsumbi* v. *Abdul Kadir* (1921) 45 Bom. 151, 59 I.C. 438 [pregnancy concealed].

Hed., 25, 26; 4, 5, Baillie, 10, 14. The usual form of proposal is, "I *have* married myself to you," and that of acceptance is, "I have consented."

Shiah law.—According to the Shiah law the presence of witnesses is not necessary in any matter regarding marriage: Baillie, Part II, 4.

197. Witnesses.—A marriage contracted without witnesses as required by s. 196 is invalid (*fasid*), but not void (*batil*).

Baillie, 155. As to invalid marriages, see ss. 204A and 206 below.

198. Number of Wives.—It is not lawful for a Mahomedan to have more than four wives at the same time. Where a Mahomedan who has four wives marries a fifth wife, the marriage is not void (*batil*), but invalid (*fasid*).

Baillie, 30, 154 (fourth class). As to invalid marriages, see ss. 204A and 206 below.

198A. Polyandry not allowed.—It is not lawful for a woman to have more than one husband at the same time.

Baillie, 154 (sixth class). "It is not lawful for a man to marry the wife of another;" Ballie, 38.

199. Marriage with women undergoing iddat.—It is not lawful for a Mahomedan to marry a widow or a divorced woman before the expiration of the period of *iddat* which it is incumbent upon her to observe on the death of her husband and on divorce. Where such a marriage does take place, the marriage is not void (*batil*), but merely invalid (*fasid*).

Explanation.—The *iddat* of a woman arising on divorce is three courses, if she is subject to menstruation; if not, it terminates at the expiration of three months from the date of divorce. The *iddat* of a woman arising on widowhood, if she is not pregnant at the time of her husband's death, is four months and ten days, and, if pregnant, four months and ten days or until delivery, whichever is longer (*x*).

Hed., 128, 129; Baillie, 38, 151, 352-358. *Iddat* is prescribed for the establishment of legitimate descent and the prevention of "confusion of blood." As to invalid marriages, see ss. 204A and 206 below. As to marriage during *iddat* consequential on husband's apostasy, see s. 237 below.

200. Difference of religion.—(*1*) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but with a *Kitabia*, that is, a Jewess or a Christian,

(*x*) *Jhandu* v. *Mst. Husain Bibi* (1923) 4 Lah. 192, 73 I. C. 590, ('23) A. L. 949.

but not with an idolatress or a fire-worshipper. But if he does marry an idolatress or a fire-worshipper, the marriage is not void (*batil*), but merely invalid (*fasid*).

(2) A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. But if she does marry a non-Mahomedan, whether he be a *Kitabi* (that is, a Christian or a Jew) or a non-*Kitabi* (that is, an idolater or a fire-worshipper), the marriage is not void (*batil*), but merely invalid (*fasid*).

Hed., 30; Baillie, 40-42, 151, 153. *Kitab* means a book, that is, a book of revealed religion. *Kitabi* means a male who believes in Christianity or Judaism. *Kitabia* is a female who believes in either of these religions. The question whether a Buddhist woman can be regarded as a *Kitabia* arose in a case before the Privy Council, but it was not decided (*y*). In the same case their Lordships of the Privy Council expressed the opinion that in all cases where, according to Mahomedan law, unbelief or difference of creed is a bar to marriage with a true believer (*i.e.*, a Mussulman), such marriage will be valid if the alien in religion embraces the Mahomedan faith Profession of such faith, whether with or without conversion, is necessary and sufficient to remove the disability But such profession must be made before or at the time of the ceremony (*z*)

Where either party to a contract is a Christian, the marriage must be solemnized in accordance with the provisions of the Indian Christian Marriage Act XV of 1872, otherwise the marriage is void (see s 4 of the Act). If the marriage is solemnized in accordance with those provisions, it will be *valid* though it be the marriage of a *Mahomedan* with a Christian. But if the marriage is not so solemnized, it is *void* though it may have been solemnized according to Mahomedan rites (*a*).

In a recent Allahabad case the question arose whether a marriage between a Sunni male and a Shiah female was illegal. It was held that it was not illegal (*b*).

As to invalid marriages, see ss. 204A and 206 below.

Shiah law.—According to Shiah law, a female Mahomedan may not lawfully marry a non-Moslem husband, nor can a male Mahomedan marry a woman who is not a *Kitabia*. But even as regards a *Kitabia*, the majority of the Asna-Asharyas hold that only a *muta* marriage (s. 252A) can be contracted with her: Baillie, Part II, 29; Tyabji, s. 51.

201. Prohibited degrees of consanguinity.—A man is prohibited from marrying (1) his mother or his grandmother how high soever; (2) his daughter or grand daughter how low soever; his sister whether full, consanguine or uterine; (4) his niece or great niece how low soever; and (5) his aunt or great aunt how high soever, whether paternal or maternal. A marriage with a woman prohibited by reason of consanguinity is void (*batil*).

Hed., 27; Baillie, 24. As to void marriages, see ss. 204A and 205A below.

(*y*) Abdul Razack v. Aga Mahomed Jaffer (1893) 21 I. A. 56, 64-65, 21 Cal. 666, 674.

(*z*) (1893) 21 I. A. 56, 64, 21 Cal. 666, 673-574, *supra*.

(*a*) See *Skinner* v. *Durga Prasad* (1904) 31 All. 239.

(*b*) *Aziz Bano* v. *Muhammad* (1925) 47 All. 823, 89 I. C 690, ('25) A. A. 720.

202. Prohibited degrees of affinity.—A man is prohibited from marrying (1) his wife's mother or grandmother how high soever; (2) his wife's daughter or grand daughter how low soever; (3) the wife of his father or paternal grandfather how high soever; and (4) the wife of his son, or of his son's son or daughter's son how low soever. A marriage with a woman prohibited by reason of affinity is void (*batil*).

Hed., 28; Baillie, 24-29, 154. As to void marriages, see ss. 204A and 205A below.

203. Prohibition on the ground of fosterage.—Fosterage is as much a bar to a lawful marriage as consanguinity, except in the case of certain foster relations, such as a sister's foster mother, or a foster sister's mother, or a foster son's sister, or a foster brother's sister, with any of whom a lawful marriage may be contracted. A marriage with a woman prohibited by reason of fosterage is void (*batil*).

Hed., 68, 69; Baillie, 30, 154, 194. As to void marriages, see ss. 204A and 205A below.

204. Women who cannot be lawfully joined together.—It is not lawful for a man to have two wives at the same time who are so related to each other that, if one of them had been a male, they could not have lawfully intermarried. But there is a conflict of decisions whether the marriage with the second of the two wives in such a case is void (*batil*) or invalid (*fasid*), the High Court of Calcutta holding that it is void (*c*), while the High Court of Bombay holding that it is merely invalid (*d*).

Hed., 28, 29; Baillie, 31, 153. Thus it is not lawful for a man to marry his wife's sister in his wife's lifetime. According to the Calcutta High Court, such a marriage is void, and the issue is illegitimate (s. 205A). According to the Bombay High Court, such a marriage is merely invalid, and the issue is not illegitimate (s. 206). The Calcutta decision, it is submitted, is not correct.

There is, of course, nothing to prevent a man from marrying his wife's sister *after* the death or divorce of the wife: Baillie, 33.

204A. Distinction between void (*batil*) and invalid (*fasid*) marriages.—(*1*) A marriage which is not valid may be either void (*batil*) or invalid (*fasid*).

(*2*) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute.

(*c*) *Aizunnissa* v. *Karimunnissa* (1895) 23, Cal. 130.

(*d*) *Tajbi* v. *Mowla Khan* (1917) 41 Bom. 485, 39 I. C. 603.

Thus a marriage with a woman prohibited by reason of consanguinity (s. 201), affinity (s. 202), or fosterage (s. 203) is void, the prohibition against marriage with such a woman being perpetual and absolute (*e*).

(*3*) An invalid marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the invalidity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are invalid, namely—

(a) a marriage contracted without witnesses (ss. 196-197);

(b) a marriage with a fifth wife by a person having four wives (s. 198);

(c) a marriage with a woman who is the wife of another (s. 198A);

(d) a marriage with a woman undergoing *iddat* (s. 199);

(e) a marriage prohibited by reason of difference of religion (s. 200);

(f) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (s. 204).

The reason why the aforesaid marriages are invalid, and not void, is that in cl. (a) the invalidity arises from an accidental circumstance; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl. (c) the objection may be removed by a divorce of the woman by her first husband; in cl. (d) the impediment ceases on the expiration of the period of *iddat*; in cl. (e) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl. (f) the objection may be removed by the man divorcing the wife that is related within the prohibited degrees to the new wife, *e.g.*, if a man has two wives *A* and *B*, and he marries *C* who is a sister of *A*, he may make *C* lawful to himself by divorcing *A*.

(*e*) Women within the prohibited degrees are called *Mooharim*.

Baillie, 150-155. Abu Hanifa does not recognise the distinction set out above between void and invalid marriages. But the distinction is recognised by his two disciples Abu Yusuf and Imam Muhammad. According to Abu Hanifa, no marriage is void, not even a marriage with a woman prohibited by reason of consanguinity, affinity or foster-, for, according to him, "all the daughters of Adam being qualified for procreation, ich is the primary object of marriage, are fit subjects for that contract" [*i.e.*, contract of marriage]: Baillie, 151, 154-155. A marriage with a woman prohibited by reason of consanguinity, affinity or fosterage, is, according to Abu Hanifa, merely invalid, the result being that if there be offspring of the marriage, they are legitimate and entitled to inherit to their father: see Baillie, 150, and s. 206 below. The opinion of Abu Hanifa is not likely to be adopted by any Court in British India.

Shiah law.—The Shiah law does not recognize the distinction between invalid and void marriages. According to that law a marriage is either valid or void. Marriages that are invalid under the Sunni law are void under the Shiah law.

205. Effects of a valid (sahih) marriage.—A valid marriage confers upon the wife the right of dower, maintenance, and residence in her husband's house, and imposes on her the obligation to be faithful and obedient to her husband, and to admit him to sexual intercourse. It creates between the parties prohibited degrees of relation and reciprocal rights of inheritance.

Baillie, 13. It may be noted that a Mahomedan husband does not by marriage acquire any interest in his wife's property (*f*).

205A. Effects of a void (batil) marriage.—A marriage that is void does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate.

Baillie, 156. See ss. 201-204A, and notes to s. 204A.

206. Effects of an invalid (fasid) marriage.—(*1*) An invalid marriage has no legal effect before consummation.

(*2*) If consummation has taken place, the wife is entitled to dower "proper" (s. 220) or specified (s. 218), whichever is less, and children conceived and born during the subsistence of the marriage are legitimate as in the case of a valid marriage. But an invalid marriage does not, even after consummation, create mutual rights of inheritance between the parties.

(*3*) An invalid marriage may be terminated by a single declaration on either side [see s. 230].

(*4*) The wife is bound to keep the *iddat* of divorce, but not the *iddat* of death [see s. 199].

(*f*) *A.* v. *B.* (1896) 21 Bom. 77, 84.

Baillie, 156-158, 694. See ss. 197-200, 204 and 204A.

A marriage with a widow before the expiration of the period of *iddat* is not void, but merely invalid (s. 199). The High Court of Lahore has held that such a marriage is illegal (?) and that the wife is not entitled to restitution of conjugal rights against her husband (*g*).

206A. Presumption of marriage.—(*1*) Marriage will be presumed, in a case of prolonged and continual cohabitation as husband and wife, without the testimony of witnesses (*h*). But though prolonged cohabitation may give rise to the presumption of marriage, the presumption is not necessarily a strong one, and it does not apply in a case where the woman, before she was brought to the house of her alleged husband, was a prostitute (*i*). The presumption may also be rebutted by showing that the conduct of the parties was inconsistent with the relation of husband and wife (*j*).

(*2*) Marriage may also be presumed from an acknowledgment made by either party that he or she was married to the other, and assented to by the other (*k*), unless the case is one where the marriage would be unlawful by reason of any of the rules laid down in ss. 198 to 204 (*l*).

(*3*) Where a man has acknowledged the paternity of a child, it will be presumed that he was lawfully married to the mother of the child,unless there is an insurmountable obstacle to such a marriage as in the cases mentioned in ss. 198 to 204 (*m*).

206B. Muta marriage.—(*1*) The Shiah law recognises two kinds of marriage, namely, (1) permanent, and (2) *muta* or temporary.

(*2*) A Shiah of the male sex may contract a *muta* marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire-worshipper, but not with a woman following any other religion. But a Shiah woman may not contract a *muta* marriage with a non-Moslem (*n*).

(*g*) *Jhandu* v. *Mst. Husain Bibi* (1923) 4 Lah. 192, 73 I. C. 590, ('23) A L. 949.

(*h*) Macnaghten, p. 58, s. 13; *Khajah Hidayat* v. *Rai Jan* (1844) 3 M. I. A. 295; *Mahomed Bauker* v. *Shurfoon-nissa* (1860) 8 M. I. A. 136.

(*i*) *Ghazanfar* v. *Kaniz Fatima* (1910) 37 I. A. 105, 109, 32 All. 345, 350; 6 I. C. 674; *Jariut-oll-Butool* v. *Hoseinee Begum* (1867) 11 M. I. A. 194.

(*j*) *Abdul Razak* v. *Aga Mahomed* (1893) 21 I. A. 56, 65, 21 Cal. 666, 674. See s. 250 below.

(*k*) Baillie, 412; Baillie, Part II, 5; *Wise* v. *Sabdulоonissa* (1867) 11 M. I. A. 177, 193-194; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I. A. 114, 120-121, 23 Bom. L. R. 636, 642-643, 60 I. C. 837.

(*l*) Baillie, 408.

(*m*) *Khajooroonissa* v. *Rowshan Jehan* (1876) 3 I.A. 291, 311-312, 2 Cal. 186, 199-200; *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 81-82, 45 Cal. 878, 889-890, 47 I. C. 513. See also ss. 247 and 249.

(*n*) Baillie, Part II, 29, 40.

(3) It is essential to the validity of a *muta* marriage that (1) the period of cohabitation should be fixed, and this may be a day, a month, a year or a term of years (*o*), and that (2) some dower should be specified (*p*). When the term and the dower have been fixed, the contract is valid. If the term is fixed, but the dower is not specified, the contract is void. But if the dower is specified, and the term is not fixed, the contract, though void as a *muta*, may operate as a "permanent" marriage (*q*).

(4) The following are the incidents of a *muta* marriage :—

(a) a *muta* marriage does not confer on the wife any right or claim to her husband's property, but children conceived while it exists are legitimate and capable of inheriting from their father (*r*) ;

(b) where the cohabitation of a man and a woman *commences* in a *muta* marriage, but there is no evidence as to the term for which the marriage was contracted and the cohabitation continues, the proper inference would in default of evidence to the contrary, be that the *muta* continued during the whole period of cohabitation, and that children conceived during that period were legitimate and capable of inheriting from their father (*s*) ;

(c) a *muta* marriage is dissolved *ipso facto* by the expiry of the term. No right of divorce is recognized in the case of a *muta* marriage, but the husband may at his will put an end to the contract of marriage by "making a gift of the term" (*hiba-i-muddat*) to the wife, even before the expiration of the fixed term (*t*) ;

(d) if a *muta* marriage is not consummated, the woman is entitled to half the dower. If the marriage is consummated, she is entitled to full dower, even though the husband may put an end to the contract by giving away the unexpired portion of the term.

(*o*) Baillie, Part II, 42.
(*p*) Baillie, Part II, 41.
(*q*) Baillie, Part II, 42-43 ; Querry Vol. I., pp. 689, 698.
(*r*) Baillie, Part II, 44 ; *Shoharat Singh* v. *Jafri Bibi* (1915) 17 Bom. L. R. 13, 24 I. C. 499 [P. C.].
(*s*) (1915) 17 Bom. L. R. 13 24 I. C. 499, *supra* [the cohabitation in this case was for 10 years].
(*t*) Baillie, Part II, 43 ; *Mahomed Abid Ali* v. *Luddun* (1887) 14 Cal. 276.

If the woman leaves her husband before the expiry of the term, the husband is entitled to deduct a proportionate part of the dower (*u*);

(e) a woman married in the *muta* form is not entitled to maintenance under the Shiah law (*v*). But it has been held that she is entitled to maintenance as a wife under the provisions of s. 488 of the Criminal Procedure Code (*w*).

The Sunni law does not recognize *muta* marriages at all [Baillie, 18].

The expression "permanent" in sub-sec. (1) is used in contradistinction to the expression "temporary." No Mahomedan marriage, either among Sunnis or Shiahs, is permanent in the sense in which a Christian or a Parsi marriage is, for the husband may divorce the wife at any time he likes.

206C. Marriage between a Sunni and a Shiah.—In the case of a marriage between a Sunni husband and a Shiah wife, the question as to the validity of the marriage is to be determined with reference to the personal law of the defendant (*x*).

Marriage of Minors.

207. Marriage of minors.—A boy or a girl who has not attained puberty (in this Part called a minor), is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian.

A boy or a girl who has attained puberty, that is, completed the age of fifteen years, is at liberty to marry any one he or she likes, and the guardian has no right to interfere if the match be equal: Macnaghten, p. 58, ss. 14-16. See s. 195 above.

Provision for benefit of minors in contemplation of marriage.—*A* has a daughter *D*. *B* has a son *S*. Both *D* and *S* are minors. *A* and *B* contract for the marriage of *D* with *S*. Prior to the marriage *B* executes an agreement with *A* that in consideration of *D*'s marraige with *S*, he (*B*) will pay to *D* Rs. 500 per month for *Kharch-i-pandan* (literally, beetle-leaf expenses), and charges certain properties of his with the payment. Some time after the marriage *B* discontinues the payments. Is *D* entitled to recover the arrears of the allowance from *B*? It has been held by the Privy Council that she is, though according to the English common law she is not, she not being a party to the contract. Their Lordships observed that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and

(*u*) Baillie, Part II, 41; (1887) 14 Cal. 276, 284-285, *supra*.

(*v*) Baillie, Part II, 97.

(*w*) *Luddun* v. *Mirza Kumar* (1882) 8 Cal. 736. This decision is of doubtful authority, because, as stated in Sharaya-ul-Islam, "the name of a *wife* does not in reality apply to a woman contracted in *moota*" [Baillie, Part II, 344].

(*x*) *Aziz Bano* v. *Muhammad* (1925) 47 All. 823, 89 I. C. 690, ('25) A. A 720.

guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts (y).

208. Guardianship in marriage (jabr).—The right to dispose of a minor in marriage belongs successively to the (1) father, (2) paternal grandfather how high soever, and (3) brother and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the Government.

Hed., 36, 39. The fact that a guardian has been appointed by the Court of the person of a minor does not take away the power of the guardian for the marriage to dispose of the minor in marriage. But the minor being in such a case a ward of the Court, the guardian for the marriage should not dispose of the minor in marriage without the sanction of the Court to the proposed marriage (z).

Apostasy of guardian for marriage.—It is doubtful whether the right to dispose of a minor in marriage is lost by the apostasy of the guardian from the Mahomedan faith. Under the Mahomedan law proper, an apostate has no right to contract a minor in marriage (Hed., 392). It is enacted, however, by Act XXI of 1850, that no law or usage shall inflict on any person who renounces his religion any "forfeiture of *rights* or property," and it was accordingly held by the High Court of Bengal in *Muchoo* v. *Arzoon* (a) that a Hindu father is not deprived of his right to the custody of his children by reason of his conversion to Christianity. In a subsequent case, however, decided by the same Court, but without any reference to *Muchoo's* case, it was held that a Mahomedan, who had become a convert to Judaism, was disqualified by reason of his apostasy from disposing of his daughter in marriage (b). In a recent Bombay case, it was held, following *Muchoo's* case, that a Hindu convert to Mahomedanism is not disqualified from giving his son in adoption to a Hindu (c). It is submitted that the right to contract a minor in marriage is a "right" within the meaning of the above Act, and that the decision in *Muchoo's* case, followed by the Bombay High Court, is the correct one.

Shiah law.—The only guardians for marriage recognised by the Shiah law are the father and the paternal grandfather how high soever: Baillie, Part II, 6. See notes to s. 210.

209. Marriage brought about by father or grandfather.—When a minor has been disposed of in marriage by the father or father's father, the contract of marriage is valid and binding, and it cannot be annulled by the minor on attaining puberty. But where a father or father's father has acted negligently or wickedly, *e.g.*, where the minor is married to a lunatic, or the

(y) *Khwaja Mahomed Khan* v *Husaini Begum* (1910) 37 I.A. 152, 32 All. 410, 7 I.C. 237.

(z) *Monijan* v. *District Judge, Birbhum* (1914) 42 Cal. 351, 25 I. C. 229.

(a) (1866) 5 W. R. 235.

(b) *In the matter of Marin Bibi* (1874) 13 B.L.R. 160.

(c) *Shamsing* v. *Santabai* (1901) 25 Bom. 551

contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty.

Hed., 37 ; Baillie, 50 ; Amir Ali, Vol. II, p. 420. See s. 210 below.

It has been held by the High Court of Allahabad that a Shiah girl given in marriage by her father to a Sunni husband has an option of repudiation on attaining puberty unless it has been ratified by consummation or otherwise, the reason given being that it would be contrary to all rules of equity or justice to force such marriage on her if on attaining puberty she considers the marriage to be repugnant to her religious sentiments (*d*).

210. Marriage brought about by other guardians: Option of puberty.—When a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option of repudiating the marriage on attaining puberty. This is technically called the "option of puberty" (*khyar-ul-bulugh*).

The right of repudiating the marriage is lost, in the case of a female, if after attaining puberty and after being informed of her right of repudiation, she does not repudiate without unreasonable delay (*e*). But in the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.

Hed. 38 ; Baillie, 50-52 ; Macnaghten, p. 58, s. 18.

Shiah law.—According to the Shiah law, a marriage brought about by a person other than a fa her or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty (*f*). See notes to s. 208, "Shiah law."

211. Effect of repudiation.—When the "option of repudiation" is exercised, the marriage is dissolved from the moment of repudiation. But the marriage is valid until repudiation, and in the event of the death of either party before repudiation, the other is entitled to all the rights of inheritance.

Hed. 37, 38 ; Baillie, 51. It is stated both in the Hedaya and the Fatea Alumgiri that the repudiation should be confirmed by a decree of the Court, and that until then the parties have mutual rights of inheritance In a Calcutta case (*g*), however, Ameer Ali, J., observed that the decree of the Court was needed *only to provide judicial evidence* in order to prevent disputes, and held that a girl who had been disposed of in marriage during her minority by her mother, and who repudiated the marriage on attaining puberty and then married another person, was not guilty of bigamy, though the repudiation was not confirmed by a judicial order.

(*d*) *Aziz Bano* v. *Muhammad* (1925) 47 All. 823, 89 I. C 690, ('25) A. A. 720.

(*e*) *Bismillah* v. *Nur Muhammad* (1922) 44 All. 61, 63 I. C. 702, ('22) A. A. 155.

(*f*) *Mulka Jehan* v. *Mahomed* (1873) L. R. I. A., Sup. Vol. 192, 26 W. R. 26.

(*g*) *Badal Aurat* v. *Queen-Empress* (1891) 19 Cal. 79.

212. Marriage of lunatics.—The provisions of sections 207 to 211, relating to the marriage of minors, apply *mutatis mutandis* to the marriage of lunatics.

Baillie, 50-54.

Maintenance of Wives.

213. Husband's duty to maintain his wife.—The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) (*h*), so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him (*i*), or is otherwise disobedient (*j*), unless the refusal or disobedience is justified by non-payment of prompt (s. 221) dower (*k*).

214. Order for maintenance.—If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance in a Civil Court, but she is not entitled to a decree for *past* maintenance, unless the claim is based on a specific agreement (*l*). Or, she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1908, section 488, in which case the Court may order the husband to make a monthly allowance for her maintenance not exceeding fifty rupees.

Shaffei law.—According to the Shaffei school, the wife is entitled to *past* maintenance though there may be no agreement in respect thereof (*m*).

215. Maintenance during iddat.—The wife is entitled to maintenance during the *iddat* consequent upon divorce (*n*), but a widow is not entitled to maintenance during the *iddat* consequent upon her husband's death (*o*).

As to the period of *iddat*, see s. 199 above. When an order is made for the maintenance of a wife under s. 488 of the Criminal Procedure Code it will cease to operate, in the case of divorce, on the expiration of the period of *iddat*, but not earlier (*p*).

Judicial Proceedings.

216. Suit for restitution of conjugal rights.—(*1*) Where a wife without lawful cause ceases to cohabit with her

(*h*) Baillie, 441.
(*i*) Baillie, 442.
(*j*) *A.* v. *B.* (1896) 21 Bom. 77, at p. 82.
(*k*) Baillie, 442.
(*l*) *Abdul Futteh* v. *Zubunnessa* (1881) 6 Cal. 631.
(*m*) *Mahamed Haji* v. *Kalimabi* (1918) 41 Mad. 211, 42 I. C. 517.
(*n*) Hed. 145, Baillie, 450.
(*o*) *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9.
(*p*) *In re Abdul Ali* (1883) 7 Bom. 180: *In the matter of Din Mahammad* (1882) 5 All. 226; *Shah Abu* v. *Ulfat Bibi* (1896) 19 All. 50.

husband, the husband may sue the wife in a Civil Court for the restitution of conjugal rights (*q*).

(*2*) Cruelty when it is of such a character as to render it unsafe for the wife to return to her husband's dominion is a valid defence to such a suit. "It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him (s. 205) for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court" (*r*).

(*3*) An agreement entered into before marriage by which it is provided that the *wife should be at liberty to live with her parents after marriage* is void, and does not afford an answer to a suit for restitution of conjugal rights (*s*). Similarly, an agreement entered into after marriage between a husband and wife who were for some time prior to the date of the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, *she should be free to leave him*, is void and does not constitute a defence to the husband's suit for restitution of conjugal rights (*t*).

(*4*) Non-payment of prompt dower (s. 221) is a defence to a suit for restitution of conjugal rights (*u*). But it is a defence in this sense only that the Court will not in such a case pass an absolute decree for restitution against the wife, but one conditional upon payment of the dower (*v*). If the marriage is consummated, non-payment of prompt dower is no defence at all to the suit (*w*).

(*5*) In a recent case, where the parties belonged to the Mussalman Kharwa community of Broach, the High Court of Bombay refused to pass a decree for restitution of conjugal rights against the wife, on the ground that the husband having been expelled from the caste, the wife was not bound to live with him (*x*).

(*q*) *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1867) 11 M.I.A. 551.

(*r*) *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1867) 11 M.I.A. 551; *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L. R. 602, 608; *Husaini Begum* v. *Muhammad* (1907) 29 All. 222; *Hamid Husain* v. *Kubra Begum* (1918) 40 All. 332, 44 I.C. 728.

(*s*) *Abdul* v. *Hussenbi* (1904) 6 Bom. L. R. 728; *Imam Ali* v. *Arfatunnisa* (1913) 18 Cal. W. N. 693, 21 I. C. 87; *Fatima Bibi* v. *Nur Muhammad* (1920) 1 Lah. 597, 60 I. C. 88

(*t*) *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L.R. 602.

(*u*) *Hussein Khan* v. *Gulab Khatun* (1911) 35 Bom. 386, 11 I.C. 558.

(*v*) *Abdul* v. *Hussenbi* (1904) 6 Bom. L. R. 728; *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L.R. 602, 611.

(*w*) *Bai Hansa* v. *Abdulla* (1905) 30 Bom. 122.

(*x*) *Bai Jina* v. *Kharwa Jina* (1907) 31 Bom.

216A. Suit for jactitation of marriage.—A suit will lie between Mahomedans in British India for jactitation of a marriage (*y*).

Jactitation is a false pretence of being married to another. " There can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardship and his heirs may be harassed by false claims after his death " (*z*).

216B. Suit for breach of promise to marry.—In a suit by a Mahomedan for damages for breach of promise to marry the plaintiff is not entitled to damages peculiar to an action for breach of promise of marriage under the English law, but to a return merely of presents of money, ornaments, clothes and other things (*a*).

B.—DOWER.

217. Dower defined.—*Mahr* or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.

See Baillie, 91, and per Mahmood, J., *Abdul Kadir* v. *Salima* (1886) 8 All. 149, at p. 157.

Marriage under the Mahomedan law is a civil contract (s. 194), and it is likened to a contract of sale. A sale is a transfer of property for a price. In the contract of marriage the " wife " is the property, and the " dower " is the price; see the Allahabad case cited above. In his book on Muhammadan Jurisprudence (p. 334) Mr. Abdur Rahim says that dower is not a consideration proceeding from the husband for the contract of marriage, but is an obligation imposed by the Mahomedan Law as a mark of respect for the wife.

Under the Mahomedan Law, a husband may divorce his wife at any time he likes without assigning any reason. The object of dower is to serve as a check upon the capricious exercise by the husband of his power to dissolve the marriage at will. To attain this end, it is usual to split the amount of dower into two parts, one payable on demand, and the other payable on the dissolution of the marriage by *death* or *divorce*; see s. 221. See notes to s. 194 above.

218. Specified dower.—(*1*) The husband may settle any amount he likes by way of dower upon his wife, though it may be beyond his means, and though nothing may be left to his heirs after payment of the amount. But he cannot in any case settle less than ten *dirams*.

(*y*) *Mir Azmat Ali* v. *Mahmud-ul-nissa* (1897) 20 All. 96.
(*z*) (1897) 20 All. 96, 97, *supra*.
(*a*) *Abdul Razak* v. *Mahomed* (1918) 42 Bom. 499, 38 I. C. 771; Macnaughten, 259. See also *Mahomed Abid Ali* v. *Ludden* (1887), 14 Cal. 276 [*muta* marriage].

(2) Where a claim is made under a contract of dower, the Court should, unless it is otherwise provided by any legislative enactment, award the entire sum provided in the contract.

Hed., 44 ; Baillie, 92 ; *Sugra Bibi* v. *Masuma Bibi* (1877) 2 All. 573 ; *Banoo Begum* v. *Mir Aun Ali* (1907) 9 Bom. L.R. 188; *Basir Ali* v. *Hafiz* (1909) 13 Cal. W. N. 153, 4 I. C. 462.

Diram.—The money value of 10 *dirams* is something between three and four rupees (*b*).

"*Unless it is otherwise provided by any legislative enactment.*"—The law to be applied by the Courts in Oudh and Ajmer-Merwara is that where a claim is made by a wife under a contract of dower, whether in her husband's lifetime or after his death, the Court should allow such amount only as appears to be reasonable with reference to the means of the husband, notwithstanding anything to the contrary in the contract [Oudh Laws Act, 1876, s. 5 ; Ajmer-Merwara Laws, Regulation 3 of 1877, s. 32.]

A, a resident of Agra (outside Oudh), is married to *B* in Lucknow in the province of Oudh. After the marriage *B* goes and resides with her husband *A* in Agra. *B* then sues *A* for her dower in the Agra Court. *A* contends that the amount of dower fixed at the time of marriage is excessive, and that it should be reduced, having regard to the provisions of the Oudh Laws Act. Has the Agra Court power to reduce the amount ? No. The mere fact that the marriage was celebrated in Oudh does not give jurisdiction to the Court of Agra to administer the law enacted by the Oudh Laws Act (*c*).

Shiah law.—Under the Shiah law, there is no fixed legal minimum for dower : Baillie, Part II, 67, 68.

219. Dower may be fixed after marriage.—The amount of dower may be fixed either before or at the time of marriage, or even subsequent to the marriage (*d*).

When the husband is a minor, his father has the power to make a contract of dower on his behalf, and such contract is binding on the husband, though it may be made on his behalf after marriage (*e*).

220. "Proper" dower.—If the amount of dower is not fixed (s. 218), the wife is entitled to "proper" dower (*mahr-i-misl*), even though the marriage may have been contracted on the express condition that she should not claim any dower. In determining what is "proper" dower, regard is to be had to the amount of dower that may have been settled upon other female members of the wife's father's family, such as her father's sisters.

(*b*) *Asma Bibi* v. *Abdul Samad* (1909) 32 All. 167, 5 I. C. 411.

(*c*) *Rukia Begum* v. *Muhammad* (1910) 32 All. 477; 6 I. C. 568.

(*d*) *Kamar-un-nissa* v. *Hussaini Bibi* (1880) 3 All. 266.

(*e*) *Basir Ali* v. *Hafiz* (1909) 13 Cal. W. N. 153, 4 I.C. 462.

Hed., 45, 53 ; Baillie, 92, 95.

Shiah law.—The proper dower under the Shiah law should not exceed 500 *dirams* (Baillie, Part II, 71). As to *diram*, see notes to s. 218.

221. Dower "prompt" and "deferred."—(*1*) The amount of dower is usually split into two parts, one called "prompt," which is payable on demand, and the other called "deferred," which is payable on dissolution of marriage by death or divorce.

(*2*) Where it is not settled at the time of marriage whether the dower is to be prompt or deferred, then according to the Shiah law, the rule is to regard the whole as prompt (*f*), but according to the Sunni law, the rule is to regard part as prompt and part as deferred, the proportion referable to each class being regulated by custom, and, in the absence of custom, by the status of the parties and the amount of the dower settled (*g*). It is not clear whether, in a case in which no specific portion of the dower has been fixed as prompt, the Court has the power, under the Sunni law, to award the *whole* amount as prompt. The High Court of Bombay has held that the Court has such power (*h*).

Baillie, 92 In 1 All 483, the Court fixed *one-fifth* of a dower of Rs. 5,000 as "prompt," the wife having been a prostitute. In 1 All 506, the Court held that a *third* of a dower of Rs. 51,000 was reasonable as "prompt" ; and the same proportion was fixed in 2 Bom H C 291. In all these cases the parties were Sunnis, and the marriage contract was silent as to whether the dower was to be prompt or deferred

222. Non-payment of "prompt" dower.—Though the wife is bound, as a necessary consequence of the marriage, to render conjugal rights to her husband, she may refuse herself to her husband, if the "prompt" dower is not paid when demanded; but once the marriage is consummated, she has no right to refuse herself to her husband, though the "prompt" dower may not be paid.

See section 216 (4) and the cases there cited. Where a woman is pregnant at the time of her marriage, but she conceals the pregnancy from her husband, the concealment does not render the marriage invalid, and she is entitled to payment of the prompt dower (*i*).

(*f*) *Mirza Bedar Bakht* v. *Mirza Khurram Bakht* (1879) 19 W. R. 315 [P. C.]; *Masthan Sahib* v. *Assan Bibi* (1899) 23 Mad. 371.

(*g*) *Eidan* v. *Mazar Hussain* (1877) 1 All. 483 ; *Taufik un-nissa* v. *Ghulam Kambar* (1877) 1 All. 506 ; *Umda Begum* v. *Muhammadi Begum* (1910) 33 All. 291, 9 I. C. 200 ; *Muhammad* v. *Saghir-un-nissa* (1919) 41 All. 562, 50 I. C. 740 ; *Fatma Bibi* v. *Sudruddin* (1865) 2 B.H.C. 291.

(*h*) *Hoosein Khan* v. *Gulab Khatum* (1911) 35 Bom. 386, 11 I.C. 558.

(*i*) *Kulsumbi* v. *Abdul Kadir* (1921) 45 Bom. 151, 59 I. C. 433.

223. Dower a debt.—The widow's claim for dower is a debt payable out of the estate of her husband, and it must, like other debts, be paid before legacies and before distribution of the inheritance.

See the cases cited in the next section. See also *Bhola Nath* v. *Maqbul-un-nissa* (1903) 26 All. 28. A widow is merely an ordinary creditor in respect of her dower debt; such a debt has no priority over other debts (Macnaghten, p. 274).

Relinquishment of dower.—A dower, being a debt, may be remitted by the widow [creditor] without acceptance by the husband's heirs (*j*). But a relinquishment of her right to dower by a widow who is a minor under the Indian Majority Act 9 of 1875 is not binding on her, though she may have completed her fifteenth year and is a major according to the Mahomedan Law (*k*). "The gift of dower to a dead husband is valid on a favourable construction of the law" [Baillie, p. 553]. But there must be free consent. Where there is no free consent, as where at the time of the gift she was overwhelmed with grief at the death of the husband and was in great mental distress, the relinquishment of her right to dower is not valid (*l*).

224. Widow's right of retention.—(*1*) The widow's claim for dower does not entitle her to a lien on any specific property of her deceased husband. But when she *is in possession* of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other heirs of her husband *to retain that possession* until her dower is paid. The right of retention is extinguished on payment of the dower debt (*m*).

There is a conflict of opinion whether it is necessary to entitle the widow to retain possession of her husband's property that the possession should have been obtained by her with the consent express or implied of her husband or his other heirs, it being held by a Full Bench of the Madras High Court that it is not (*n*), and by the High Court of Calcutta that it is (*o*).

(*2*) A widow, who is in possession of the estate of her husband, is bound to account to the other heirs of her husband for the rents and profits received by her from the estate

(*j*) *Jyani Begam* v. *Umrav Begum* (1908) 32 Bom. 612; Indian Contract Act, s. 63

(*k*) *Abi Dhunimsa Bibi* v. *Mahammad* (1918) 41 Mad. 1026, 44 I. C. 293.

(*l*) *Nurannessa* v. *Khalc Mahomed* (1920) 47 Cal. 537, 56 I. C. 8.

(*m*) *Beebee Bachun* v. *Sheikh Hamid* (1871) 14 M. I. A. 377; *Amani Begam* v. *Mahammad* (1894) 16 All. 225; *Umatul Mehdi* v. *Kulsum* (1908) 35 Cal. 120; *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I. A. 294, 301, 38 All. 581, 588; 36 I. C. 87, *Maina Bibi* v. *Chaudhri Vakil* (1925) 52 I. A. 145, 149-150, 47 All. 250, 254-255, 86 I. C. 579, ('25) A. P. C. 63.

(*n*) *Beeju Bee* v. *Syed Moothiya* (1920) 43 Mad. 214, 53 I. C. 905.

(*o*) *Sabur Bibi* v. *Ismail* (1924) 51 Cal. 124, ('24) A. C. 508, dissenting from *Sahebjan* v. *Ansuruddin* (1911) 8 Cal. 475, 9 I. C. 1031.

during the time of her possession, if so required by them (p). But she is entitled in that case to compensation for forbearing to enforce her right to the dower debt; this compensation may be allowed in the form of interest upon the dower debt (q).

[*A* dies leaving a widow and a sister. Some time after *A*'s death, the widow applies to the Collector to have certain lands forming the entire estate of *A* registered in her name, alleging that she has been in possession of the lands by right of inheritance *and also on account of her dower*. The application is opposed by the sister, but the lands are registered by the Collector in the widow's name After ten years, the sister sues the widow to recover her share (three-fourths) in the estate of *A*. The widow contends that she is entitled to continue in possession and enjoyment of the estate until payment of her dower. The widow is entitled to retain possession until her dower is satisfied; *Beebee Bachun* v. *Sheik Hamid* (1871) 14 M. I. A. 377. (In the case cited above, the widow was in possession at the date of the suit, and the Privy Council held that her possession was *lawful*, though the sister *had opposed* the application of the widow to have the property transferred to her name. The reason is that possession was *not* obtained by the widow *unlawfully or by force or fraud*.)]

Sub-sec. (1).—In *Beebee Bachun's case* cited in the above illustration, their Lordships of the Privy Council said: "The appellant (widow) having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied . . . It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hoosein* v. *Mussumat Khodeja* (10 W. R. 369). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, *to hold* the property of her husband, *of which she had lawfully, and without force or fraud, obtained possession*, until her debt is satisfied, with the liability, to account, to those entitled to the property, subject to the claim for the profit received."

The conflict referred to in the 2nd para of sub-sec. (1) arises from the italicized words which occur in the following passage in the judgment of the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (r) :-

" But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, *with the express or implied consent of the husband, or his other heirs*, obtains possession of the whole or part of his estate, to satisfy her claim with the rents . . . accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board."

The Full Bench of the Madras High Court held that the words italicized above were merely *obiter dicta*. The Calcutta High Court held, dissenting from the Madras High Court, that their Lordships of the Privy Council were defining in the above passage the nature

(p) (1871) 14 M. I. A. 377, at p. 384, *supra*.

(q) *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I. A. 294, 38 All. 581, 36 I. C. 87, affirmg. (1910) 33 All. 182, 7 I. C. 497 [interest allowed at 6 per cent. per annum]; *Woomatool* v. *Meerun-mun-nissa* (1868) 9 W. R. 318; *Sahebjan* v. *Ansaruddin* (1911) 38 Cal. 475, 480-481, 9 I. C. 1031.

(r) (1916) 43 I. A. 294, 301, 38 All. 581, 588, 36 I. C. 87

of the widow's dower debt and her right to retain possession of her husband's property, and that the observations of their Lordships were not obiter dicta. The decisions of the Allahabad High Court are of a date prior to the Privy Council decision in *Hamira Bibi's case*. Those again are not uniform, it being held in some cases that the possession should have been obtained with the consent express or implied of the husband's other heirs (*s*) and in other cases that no consent was necessary (*t*). The consent of the husband has reference to the case where the husband in his lifetime lets his wife into possession so that she may recover her dower debt out of the income of the property.

Suit by husband's heirs for possession.—Note that the husband's heirs are *not personally* liable to pay the dower debt. Any one heir may therefore sue for possession of *his share* of the estate on payment to the widow of his proportionate part of the dower debt (*u*). See s. 223.

Wife's right during husband's lifetime.—A wife who has not been divorced is not entitled to possession of any part of her husband's property during his lifetime until the dower debt has been discharged (*v*).

225. Nature of the above right.—(*1*) The widow who holds possession of her husband's property until she has been paid her dower has no estate or interest in the property as has a mortgagee under an ordinary mortgage. There is no real or true analogy between the widow's right of retention and a mortgage usufructuary or other. In the case of a mortgage the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor. The widow's right of retention is conferred upon her not by the agreement or bounty of her husband, but by the Mahomedan law (*w*).

The right of the widow to retain possession of her husband's property until satisfaction of the dower, debt does not carry with it the right of selling, mortgaging, or otherwise transferring the *property* (*x*). If she alienates the property itself, and delivers possession thereof to the alienee, her husband's other heirs are entitled to recover possession of the property from the alienee without payment to him of the dower debt. But this, it seems, does not affect her right to recover the dower debt from the other heirs of her husband out of his estate (*y*).

(*s*) *Ramzan Ali* v. *Asghari Begam* (1910) 32 All. 563, 6 I. C. 105.

(*t*) *Amanatunnissa* v. *Bashir-un-nissa* (1894) 17 All. 77; *Muhammad Karimullah* v. *Amani Begam* (1894) 17 All. 93.

(*u*) *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I.A. 294, 38 All. 581 36 I.C. 87, affmg. (1910) 33 All. 182, 7 I. C. 497.

(*v*) *Narayana* v. *Biyari* (1922) 45 Mad. 103, 69 I. C. 977, ('23), A. M. 57.

(*w*) *Maina Bibi* v. *Chaudhri Vakil* (1925) I.A. 145, 150-1 51, 47 All. 250, 255-256, 86 I. C. 679, ('25), A.P.C. 63.

(*x*) *Chuki Bibi* v. *Shams-un-nissa* (1894) 17 All. 19 [mortgage]; *Maina Bibi* v. *Wasi Ahmad* (1919) 41 All. 538, 51 I. C. 242, [gift]; *Beeju Bee* v. *Syed Moorthiya* (1920) 43 Mad. 214, 238, 58 I. C. 905 [sale].

(*y*) *Maina Bibi* v. *Chaudhri Vakil* (1925) 52 I. A. 145, 159, 47 All. 250 262, 86 I.C. 579, ('25) A.P.C. 63.

This sub-section deals with the right of a widow to alienate the *property* of which she is in possession. The next sub-section deals with her right to transfer the dower debt and the right of possession. An alienation by a widow of the *property* is void, but a transfer of the dower debt and of the right of possession may be valid.

(2) There is a conflict of opinion as to whether the widow's right of retention is transferable and heritable. In some cases it has been held that the right of retention is a *personal* right, and it cannot therefore be transferred by sale, gift, or otherwise (z), nor can it pass to her heirs on her death (a). In other cases it has been held that the right of retention is *property*, and it is transferable as well as heritable (b). In a recent case their Lordships of the Privy Council expressed a doubt whether a widow could transfer her dower debt or her right to retain possession until the debt was discharged (c).

It is clear that if the right is *heritable*, the heirs of the widow are entitled to *continue* in possession of the property of which the widow was in possession at the time of her death until the dower debt is satisfied. But if the widow herself never got into possession, her heirs cannot enter into possession (d).

A transfer by a widow of the property itself cannot be treated as a transfer of her dower debt and the right to hold possession thereof until the debt was paid (e).

(3) Where the property of which the widow is in possession was mortgaged by her husband, the mortgagee may sell it, and the widow is not entitled to retain possession of the property against a purchaser from the mortgagee (f). The reason is that she has no *charge* on her husband's estate in respect of her dower debt (g).

(4) A widow, though she may be in possession of a portion of her husband's property under a claim for her dower, is entitled to sue her husband's heirs to recover her dower debt out of his estate (h).

(5) Where a widow, who has been in possession of her husband's property under a claim for her dower, is dispossessed,

(z) *Ali Muhammad* v. *Aziz-ullah* (1883) 6 All. 50; *Muzaffer Ali* v. *Parbati* (1907) 29 All. 640.

(a) *Hadi Ali* v. *Akbar Ali* (1898) 20 All. 262.

(b) *Aziz-ul-lah* v. *Ahmad* (1885) 7 All. 353 [heritable]; *Ali Bakhsh* v. *Allahdad* (1910) 32 All. 551, 561, 6 I. C. 376; *Abdulla* v. *Shamsh-ul-Haq* (1921) 43 All. 127, 131, 58 I. C. 833; *Beeju Bee* v. *Syed Moorthiya* (1920) 43 Mad. 214, 237, 53 I. C. 905; *Majidmian* v. *Bibisaheb* (1916) 40 Bom. 34, 47-49, 30 I. C. 870; *Mussammat Bibi* v. *Musammat Bibi* (1923) 2 Pat. 84, 70 I. C. 312, ('23), A. P. 33. See also *Sheikh Abdur Rahman* v. *Sheikh Wali* (1923) 2 Pat. 75, ('23), A. P. 72

(c) *Maina Bibi* v. *Chaudhri Vakil* (1925) 52 I. A. 145, 159, 47 All. 250, 262, 86 I. C. 579, ('25), A. P. C. 63.

(d) *Tahir-un-nissa* v. *Nawab Hasan* (1914) 36 All. 558, 24 I. C. 938.

(e) *Maina Bibi* v. *Chaudhri Vakil* (1925) 52 I. A. 145, 159, 47 All. 250, 262, 86 I. C. 579, ('25) A. P. C. 63.

(f) *Ameer Ammal* v. *Sankaranarayanan* (1900) 25 Mad. 658.

(g) *Kaniz Fatima* v. *Ram Nandan* (1923) 45 All. 384, 73 I. C. 977, ('23) A. A. 331.

(h) *Ghulam Ali* v. *Sagir-ul-Nissa* (1901) 23 All. 432.

she may institute a suit for recovery of possession of the property (*i*).

226. Limitation.—(*1*) The period of limitation for a suit to recover "prompt" or "exigible" dower is three years from the date when the dower is demanded and refused, or, where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce.

(*2*) The period of limitation for a suit to recover "deferred" dower is three years from the date when the marriage is dissolved by death or divorce.

Limitation Act, 1908, sch. I., arts. 103, 104.

C.—DIVORCE.

227. Different forms of Divorce.—The contract of marriage under the Mahomedan law may be dissolved in three ways: (1) by the husband at his will, without the intervention of a Court of Law; (2) by mutual consent of the husband and wife, also without the intervention of a Court; or (3) by a judicial decree at the suit of the husband or wife. A wife cannot divorce herself from her husband except by obtaining a judicial decree in that behalf.

When the divorce proceeds from the husband, it is called *talak* (ss. 228-234); when it is effected by mutual consent of the husband and wife, it is called *khula* (s. 235) or *mubarat* (s. 236) according to the terms of the contract between the husband and the wife.

228. Divorce by talak.—Any Mahomedan of sound mind, who has attained puberty, may "divorce his wife without any misbehaviour on her part or without assigning any cause."

Macnaghten, p. 59; Hed., 75; Baillie, 208-209.

229. Form of talak immaterial.—No special form or formula is necessary to constitute a valid *talak*; but it is necessary that the words used must clearly indicate the intention of the husband to dissolve the marriage (*j*).

(*i*) *Majidmian* v. *Bibisaheb* (1916) 40 Bom. 34, 49-50, 30 I. C. 870 [suit by widow and heirs of a co-widow]; *Azizullah* v. *Ahmad* (1885) 7 All. 353 [suit by heirs of a widow].

(*j*) *Ibrahim* v. *Syed Bibi* (1888) 12 Mad. 63; *Wahid Khan* v. *Zainab Bibi* (1914) 36 All. 458, 25 I. C. 387; *Asha Bibi* v. *Kadir* (1909) 33 Mad. 22 3 I. C. 730; *Kalentl e* v. *Ma Mi* (1924) 2 Rang. 400, ('24) A. R. 363. See also *Hamid Ali* v. *Imtiazun* (1878) 2 All. 71 where the words "Thou art my cousin, the daughter of my uncle, if *thou* goest to thy father's house without my consent," were held sufficient to constitute a divorce.

It is not necessary for the validity of a *talak* that the declaration of *talak* should be actually made to the wife (*k*). Absence of the wife does not make the pronouncement of *talak* void and inefficacious (*l*).

Thus where a Mahomedan belonging to the Hanafi sect went to a Kazi with two witnesses, and after pronouncing the divorce of his wife in her absence had a *talaknama* written out by the Kazi which was duly signed and attested by witnesses, it was held that the fact that the declaration of *talak* was not actually made to the wife, but in her absence, to the Kazi and the witnesses, did not vitiate the divorce; "such a writing," it was said, "even though not communicated to the wife, effected an irrevocable divorce *as from the date of the document*" (*m*). See s. 232 below.

230. Divorce by talak how effected.—Divorce by *talak*, when the marriage is *consummated*, may be effected in any of the three following ways:—

(1) by a *single* declaration of *talak* followed by abstinence from sexual intercourse for the period of *iddat* (called *talak ahsan*); or,

(2) by a declaration of *talak* repeated *three times, once during each successive tohr* (period between menstruations), and accompanied by abstinence from sexual intercourse until the third pronouncement (called *talak hasan*); or,

(3) by a declaration of *talak* repeated *three times* in immediate succession or at intervals *within one tohr* (*n*) (called *talak-ul-bidaat*). But the triple repetition is but one of the forms by which the irrevocability, which is the essential feature of *talak-ul-bidaat*, is indicated, and a *talak-ul-bidaat* is none the less valid though it may be pronounced by a *single* declaration, provided it clearly indicates an intention *irrevocably* to dissolve the marriage (*o*).

When the marriage is *not consummated*, the divorce may be accomplished by a single declaration of *talak*.

Hed., 72, 73, 83; Baillie, 206, 207, 226, 227. As to *iddat*, see s. 177 above.

The Hanafis divide *talak* into *talak-us-sunnat*, that is, *talak* according to the rules laid down in the *sunnat* or traditions, and *talak-ul-bidaat*, that is, heretical or irregular *talak*. The *talak-ul-sunnat* is again sub-divided into (1) *ahsan*, that is, most proper, and (2) *hasan*, that is, proper. The *talak-ul-bidaat* or irregular divorce is good in law, though bad in theology, and it is the most common and prevalent mode of repudiation in this

(*k*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537, 544; *Asha Bibi* v. *Kadir* (1909) 33 Mad. 22, 3 I. C. 730; *Rajasaheb, In re*, (1920) 44 Bom. 44, 54 I. C. 573.

(*l*) *Ful Chand* v. *Nazab Ali* (1909) 36 Cal. 184, 1 I. C. 740.

(*m*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

(*n*) *In re Abdul Ali* (1883) 7 Bom. 180; *Amir-ud-Din* v. *Khatun Bibi* (1917) 39 All. 371. 39 I. C. 513.

(*o*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

country (*p*). In the case of *talàk ahsan* and *talàk hasan*, the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (s. 231), and the husband has the option to revoke it before then. But the *talàk-ul-bidaat* becomes irrevocable immediately it is pronounced (s. 231). The essential feature of a *talàk-ul-bidaat* is its irrevocability. One of the tests of irrevocability is the repetition *three times* of the formula of divorce *within one tohr*. But the *triple repetition* is not a necessary condition of *talàk-ul-bidaat*, and the intention to render a *talàk* irrevocable may be expressed even by a *single* declaration. Thus if a man says: "I have divorced you by a *talàk-ul-bain* (*irrevocable divorce*)," the *talàk* is *talàk-ul-bidaat* and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "*bain* (irrevocable)" manifests of itself the intention to effect an irrevocable divorce. It may here be said that a *talàk* by writing belongs to the class of *talàk-ul-bidaat*, for in the absence of words showing a different intention, the writing must be presumed to take effect from the time of its execution; see. sec. 232.

A *talàk-ul-bidaat* should be pronounced during the period of *tohr*. If it is pronounced during the period of *menstruation*, the *talàk* loses its character of irrevocability, and it may be *revoked* at the option of the husband at any time before the expiration of the period of *iddat*: Baillie, 207.

Shiah law.—The Shiah lawyers do not recognize the validity of *talak-ul-bidaat*, Baillie, Part II, 118. *Talàk* under the Shiah law must be pronounced in the presence of two competent witnesses (Baillie, Part II, 113).

231. When talak becomes irrevocable.—(*1*) The *talàk* called *ahsan* [s. 230 (1)] becomes complete and irrevocable on the expiration of the period of *iddat*.

(*2*) The *talák* called *hasan* [s. 231 (2)] becomes complete and irrevocable immediately on the third pronouncement, and it is not suspended until completion of the *iddat*.

(*3*) The *talak-ul-bidaat* [s. 231 (3)] becomes complete and irrevocable immediately it is pronounced.

Until a *talák* becomes complete and irrevocable, the husband has the option to revoke it, which may be done either expressly, or impliedly as by resuming sexual intercourse.

Hed., 72, 73; Baillie, 206, 207, 226. In all the three forms of *talák* the wife is bound to observe the *iddat*, though in the second and the third case, the divorce may become irrevocable *before* completion of the *iddat*. As to *iddat* see s. 199 above. See also s. 243, cls. 1, 3, 5 and 6.

As to *talak-ul-bidaat*, see the penultimate paragraph of the notes to sec. 230.

232. Talak by writing.—In the absence of words showing a different intention, a *talak* by writing operates as an irrevocable divorce (*talák-i-bain*), and takes effect immediately on the execution of the document (*talàknama*) (*q*).

(*p*) *Amir-ud-Din* v. *Khatun Bibi* (1917) 39 All. 371, 375, 39 I. C. 513.

(*q*) Baillie, 233, *Sarabai* v *Rabiabai* (1905) 30 Bom. 537.

In a Bombay case (*r*), a Mahomedan appeared before the Kazi of Bombay and executed a *talàknama*, which ran as follows: "As on account of some disagreement between us there has arisen some ill-feeling, I, the declarant, appear personally before the Kazi of my free will, and divorce Sarabai, my wife by *nika*, by one *bain-talàk*, (irrevocable divorce), and renounce her from the state of being my wife." The Court observed: "The authorities show that a *bain-talàk*, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing. The divorce being absolute [and irrevocable], it is effected as soon as the words are written, even without the wife receiving the writing." Note that the *talàk* in the above case, being *talàk-i-bain* or "irrevocable" *talak*, belongs to the category of *talak-ul-bidaat*, the *talàk-ul-bidaat* being the only kind of *talàk* which becomes *irrevocable* immediately it is pronounced. The other two kinds of *talàk*, namely, *talàk-ahsan* and *talak-hasan* are *always revocable and the option to revoke continues for a certain period.*

233. Stipulation by wife for right of divorce.—An agreement made whether before or after marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Mahomedan law. When such an agreement is made, the wife may, at any time after the happening of the contingency, repudiate herself in the exercise of the power, and a divorce will then take effect to the same extent as if the *talak* had been pronounced by the husband (*s*). The power so delegated to the wife is not revocable, and she may exercise the power even after institution of a suit against her for restitution of conjugal rights (*t*).

(a) *A* enters into an agreement before his marriage with *B*, by which it is provided that *A* should pay *B* Rs. 400 as her dower on demand, that he should not beat or ill-treat her, that he should allow *B* to be taken to her father's house four times a year, and that if he committed a breach of any of the conditions, *B* should have the power of divorcing herself from *A*. Some time after the marriage *B* divorces herself from *A*, alleging cruelty and non-payment of dower. *A* then sues *B* for restitution of conjugal rights. Here the conditions are all of a reasonable nature, and they are not opposed to the policy of the Mahomedan law. The divorce is therefore valid, and *A* is not entitled to restitution of conjugal rights: *Hamidoola* v. *Faizunnissa* (1882) 8 Cal. 327.

Note.—The agreement in the above case may be supported on the doctrine of *tafweez*, which is an essential part of the Mahomedan Law of Divorce. Under that law the husband may *in person* repudiate his wife, or he may *delegate* the power of repudiating her to a third party or even to the *wife* (Baillie, 238): such a delegation of power is called *tafweez*. "When a man has said to his wife, 'Repudiate thyself,' she can repudiate herself at the meeting, and he cannot divest her of the power" (Baillie, 254). "When a man has said to his wife, 'Choose thyself, a month or a year,' she may exercise option (of repudiation)

(*r*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

(*s*) *Hamidoola* v. *Faizunnissa* (1882) 8 Cal. 327; *Ayatunnissa Beebee* v. *Karam Ali* (1908) 36 Cal. 23; *Maharam Ali* v. *Ayesa Khatun* (1915) 19 Cal. W. N. 1226, 31 I. C. 562; *Sainuddin* v. *Latiffannessa Bibi* (1919) 46 Cal. 141, 48 I. C. 609 [agreement *after* marriage].

(*t*) (1919) 46 Cal. 141, 48 I. C. 609, *supra*.

at any time within the given period " (Baillie, 242). The agreement in the case cited above may be regarded as a case of repudiation by the wife under an authority from the husband, in other words, as a *talak* by *tafweez*. Such a divorce, though it is *in form* a divorce of the husband *by the wife*, operates *in law* as a *talak* of the wife *by the husband*.

(b) An agreement between a husband and wife by which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent is valid: *Maharam Ali* v. *Ayesa Khatum* (1915) 19 Cal. W.N. 1226, 31 I.C. 562; *Badarannissa* v. *Mafiattalla* (1871) 7 Beng. L. R. 442.

At any time after the happening of the contingency.—Thus where a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one, and she has a continuing right to exercise the power (*u*).

234. Talak under compulsion.—A *talak* pronounced under compulsion is valid. Similarly a *talak* pronounced by a husband in a state of intoxication is valid, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Hed., 75, 76; Baillie, 208-210; *Ibrahim* v. *Enaydur* (1869) 4 B. L. R. A. C. 13 (as to *talak* under compulsion). The reason of the rule is that a husband acting under compulsion has the choice of two evils, one, the threat held out to him and the other, divorce: and if he makes a *choice* of divorce, divorce will take effect. As to the efficacy of divorce pronounced in a state of voluntary intoxication, it is stated in the Hedaya that " the suspension of reason being occasioned by an offence, *the reason of the speaker is supposed still to remain*, whence it is that his sentence of divorce takes effect, in order to deter him from drinking fermented liquors which are prohibited "

Shiah law.—Under the Shiah law a *talak* pronounced under compulsion or in a state of intoxication is a legal nullity (Baillie, Part II, 108).

234A. Talak where marriage solemnized in England according to English law.—A civil marriage solemnized at a Registrar's Office in London between a Mahomedan domiciled in India and an Englishwoman domiciled in England cannot be dissolved by the husband handing to the wife a *talaknama* [writing of divorcement (s. 232)], although that would be an appropriate mode of effecting the dissolution of a Mahomedan marriage according to Mahomedan law (*v*).

The reason is that such a marriage is a Christian marriage by which is meant the voluntary *union for life of one man and one woman* to the exclusion of all others; it is not a marriage in the Mahomedan sense which can be dissolved in a Mahomedan manner. A Mahomedan marriage, being a polygamous marriage, is, according to the English law, no marriage at all.

(*u*) *Ayatunnissa Beebee* v. *Karam Ali* (1909) 36 Cal. 23, 1 I. C. 513.

(*v*) *Rex* v. *Hammersmith*, Superintendent Registrar of Marriages [1917] 1 K. B. 634.

235. Khula divorce.—(*1*) A divorce by *khula* is a divorce with the consent, and at the instance, of the wife, in which she gives, or agrees to give, a consideration to the husband for the release from the marriage tie. In such a case the terms of the bargain are matter of arrangement between the husband and the wife, and the wife may, as a consideration for the divorce, release her dower and other rights, or make any other agreement for the benefit of the husband.

(*2*) The divorce by *khula* is complete and irrevocable from the moment the husband repudiates the wife.

(*3*) Non-payment by the wife of the consideration for a *khula* divorce does not invalidate the divorce, but the husband may sue the wife to recover the amount payable by her under the agreement (*w*).

Hed., 112-116; Baillie, 305 *et seq.*

Khula means *to lay down.* "In law, it is the laying down by a husband of his right and authority over his wife." A *khula* divorce is virtually a divorce *purchased* by the wife from the husband for a price, and it is in this respect that *khula* differs from *mubarat* dealt with in the next section.

236. Mubarat divorce.—A divorce by *mubarat* or mutual release operates as a complete discharge of all marital rights on either side. It is effected by mutual consent, and it differs from *khula* in that no consideration passes from the wife, to the husband. But, like *khula* it becomes complete and irrevocable from the moment of repudiation.

Hed., 116; Baillie, 306.

237. Apostasy from Islam.—Apostasy from Islam of either party to a marriage operates as a complete and immediate dissolution of the marriage (*x*).

H and *W*, both Mahomedans, are husband and wife. *H* becomes a convert to Christianity. *W* then marries *A*, but before the completion of the period of *iddat* (s. 199). Is *W* guilty of bigamy within the meaning of s. 494 of the Indian Penal Code? No, because apostasy operates, as an *immediate* dissolution of marriage (*y*).

237A. Agreement for future separation.—An agreement between a Mahomedan husband and wife which provides for future separation in the event of disagreement between them

(*w*) *Moonshee Buzul-ul-Raheem* v. *Luteeful-oon-Nissa* (1861) 8 M. I. A. 379, 395; *Saddan* v. *Faiz Bakhsh* (1920) 1 Lah 402, 55 I. C. 184.

(*x*) *Amir Beg* v. *Saman* (1910) 33 All. 90, 7 I. C. 342.

(*y*) *Abdul Ghani* v. *Azizul Huq* 1912) 39 Cal. 409, 14 I. C. 641.

is void as being against public policy (*z*). But an ante-nuptial agreement between the prospective husband and the prospective wife, entered into with the object of securing the wife against ill-treatment and of ensuring her a suitable amount of maintenance in case she is ill-treated, is not void as being against public policy (*a*).

When wife may sue for divorce.

238. When wife may sue for divorce.—The wife cannot divorce herself from her husband except in the cases stated in sections 235 and 236. But she may *sue* for divorce on the ground of her husband's impotency (s. 239), or on the ground of *laan* (imprecation) (s. 240).

Suits by a *husband* for divorce are rare, as a husband may divorce his wife without judicial assistance.

239. Impotence of husband.—No decree can be passed in a suit for divorce on the ground of the husband's impotence, unless it is proved (1) that the impotence existed at the time of marriage, and (2) that the wife had no knowledge of it at the time of marriage.

If the above facts are established, the Court will adjourn the further hearing of the suit for a year in order to ascertain whether the infirmity is inherent or whether it is merely supervenient or accidental. If the defect is not removed within the aforesaid period, the Court will pass a decree dissolving the marriage on the application of the wife. The divorce becomes irrevocable when the decree is passed.

Hed., 126-128; Baillie, 347-349. There is a difference of opinion as to whether the year should be a lunar year or a solar year. In Baillie's Digest of Mahomedan Law it is stated that the year is to commence from the "time of litigation." But in *A.* v. *B* (*b*) and *Muhammad Ibrahim* v. *Altafan* (*c*), the further hearing appears to have been adjourned for a year from the *date of the order.* In *Vadaka Vitil* v. *Odakel* (*d*) the alleged impotence was not proved.

240. "Laan" or imprecation.—If a husband charges his wife with adultery, the wife may claim divorce *by a suit*; *but* "laan" does not *ipso facto* operate as a divorce (*e*).

Hed., 123; Baillie, 335.

(*z*) *Bai Fatma* v *Alimahomed* (1913) 37 Bom. 280, 17 I C. 946. See Indian Contract Act, 1872, s. 23.

(*a*) *Muhammad Muin-ud-Din* v. *Jamal* (1921) 43 All. 650.

(*b*) (1896) 21 Bom. 77, at p. 83.

(*c*) (1925) 47 All. 243, 83 I. C. 27, ('25) A. A. 24.

(*d*) (1881) 3 Mad. 3474.

(*e*) *Zafar Husain* v. *Ummat-ur-Rahman* (1919) v. All. 278, 49 I. C. 256; *Jaun Beebee* 41 *Beparee* (1865) 3 W. R. 93.

241. No other ground of divorce recognized.—A wife is not entitled to claim divorce on any other ground, not even if the husband fails to perform the obligations arising on marriage.

As to the obligations arising on marriage, see s. 205 above. As to the obligation of *maintaining* the wife, it is expressly stated in the Fatwa Alumgiri that "a man is not to be separated from his wife for inability to maintain her:" Baillie, 443. As to the obligation of *conjugal fidelity* on the part of the husband, and *payment of prompt dower* to the wife, and treating her with *kindness*, it is nowhere stated in the Hedaya or Fatwa Alumgiri that conjugal infidelity or non-payment of prompt dower or cruelty to the wife is a ground of *divorce*. As to how far failure to perform the above obligations is a valid defence to a suit for *restitution of conjugal right*, see s. 216 above.

242. Wife's costs in a suit for divorce.—The rule of English law which makes the husband in divorce proceedings liable *prima facie* for the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans.

It was so laid down by the High Court of Bombay in *A.* v. *B.* (1896) 21 Bom. 77. That was a suit by a Mahomedan wife against her busband for divorce on the ground of his impotence. The English rule is founded upon the doctrine of the Common Law according to which the husband becomes entitled upon marriage to the whole of the wife's personal property and to the income of her real property. Such being the case, it is but just that the husband should pay the wife's costs pending the hearing to enable her to conduct her case against him. Under the Mahomedan law, however, the husband does not by marriage acquire any interest in the property of the wife. Hence it was held in the above case that the practice of the English Divorce Court should not be applied to proceedings for divorce between Mahomedans.

Legal effects of divorce.

243. Rights and obligations of parties on divorce.—The following rights and obligations arise on the dissolution of a contract of marriage by divorce, whatever may be the form of divorce, and whether it is effected by a judicial decree or without it:—

(1) The wife is bound to observe the *iddat* during the period specified in s. 199, but not if the marriage was not consummated (*f*).

(2) If the wife observes the *iddat*, the husband is bound to maintain the wife during the whole period of *iddat* (s. 215).

(3) The wife cannot marry another person until after completion of her *iddat* (s. 199). And if the husband has

(*f*) Baillie, 353.

four wives, including the divorced one, he cannot marry a fifth one until after completion of the *iddat* of the divorced wife (*g*).

(4) The wife becomes entitled to the "deferred" dower (s. 221). And if the "prompt" dower has not been paid, it becomes payable immediately on divorce. But if the marriage has not been consummated, the wife is not entitled on divorce to the whole of the unpaid dower, but only to half the aggregate amount of the "prompt" and "deferred" dower (*h*).

(5) In the event of the death of either party before the expiration of the period of *iddat*, the other is entitled to inherit to him or to her in the capacity of wife or husband, as the case may be, provided the divorce *had not become irrevocable* before the death of the deceased; the reason being, that the husband might have revoked the divorce, if death had not supervened. But there is no such right *after* the divorce has become irrevocable (*i*).

If the divorce is pronounced in death-illness (*marz-ul-maut*), and the husband dies before completion of the wife's *iddat*, the wife is entitled to inherit to him even if the divorce *had become irrevocable* prior to his death, unless the divorce was effected with her consent; the reason of the rule being that a sort of inchoate right of inheritance arises on death-illness, and the husband cannot defeat that right while on his death-bed. But the husband is not entitled under similar circumstances to inherit to the wife, if the wife dies before completion of her *iddat*, the reason being that the divorce proceeded from him and not from her (*j*).

A husband divorces his wife by *talak-ul-badaat* pronounced by him while in "health" and during the *tohr* of the wife. After pronouncing the divorce, but before the expiration of the period of *idaat*, the husband dies. The wife has no claim to inherit to the husband, notwithstanding the husband's death before the completion of the period of *idaat*. The reason is that a *talak-ul-badaat* becomes irrevocable immediately it is pronounced (*j*). This is a case under para. 1 of cl. 5. See s. 231 (3).

Neither is the husband entitled to inherit to the wife, nor the wife to the husband, in the event of the death of either of them *after* the expiration of the period of *iddat* (*k*).

(*g*) Hed., 32; Baillie, 37.
(*h*) Hed., 44, 45: Baillie, 96, 97.
(*i*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.
(*j*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.
(*k*) Hed., 99, 100, 103.

(6) In the case of a divorce completed by a triple repudiation, it is not lawful for the parties to re-marry unless the woman shall have been married to another person and divorced by him after consummation of the marriage (*l*).

The first para. of cl. (5) refers to the case where the divorce has not yet become irrevocable, and the husband dies before completion of the period of *iddat*. The second para. refers to cases where the divorce is pronounced in death-illness. Cl. (6) refers to *talak-hasan* (s. 230).

D.—LEGITIMACY.

244. Special rules.—The subject of Parentage in Mahomedan law derives its importance from the special rules relating to legitimacy and filiation by acknowledgment.

An illegitimate child, we have seen, can inherit to its *mother alone* and her relations (s. 72). But a legitimate child is entitled to inherit also to its *father* and his relations. And it has been seen in s. 206 above that the issue even of an *invalid* marriage (as distinguished from a *void* marriage) is regarded as legitimate

245. Presumption as to legitimacy: birth during marriage.—A child born of a married woman *six months after* the date of the marriage is presumed to be the legitimate child of the husband, but not a child born within less than six months after the marriage (*Baillie*, 392-393).

The rule of the Indian Evidence Act, however, is that the birth of a child *at any time during the continuance* of a marriage, is conclusive proof of its legitimacy, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten (s. 112 of the Evidence Act).

It is submitted that the rule of the Evidence Act supersedes the rule of the Mahomedan law.

[*A* marries *B* on 1st January 1905. *B* gives birth to a child on 1st March 1905. *A* dies two days after the birth of the child. Can the child inherit to *A* ? It will be entitled to inherit, if it can be regarded as the legitimate child of *A*. Under the Mahomedan law, the child cannot be regarded as legitimate, it having been born within less than six months after the marriage. Under the Evidence Act, it is legitimate, it having been born during the continuance of the marriage. It is doubtful by which of these two rules the question of legitimacy is to be determined: *Muhammed Allahadad* v. *Muhammed Ismail* (1888) 10 All. 289, at p. 339.]

The Mahomedan law requires as a condition of legitimacy that *conception* should have commenced after marriage; a child, conceived before marriage is, therefore, not

(*l*) Hed., 108; Baillie, 292; *Akhtaroom-Nissa* v. *Sharutoola* (1867 7 W. R. 268.

legitimate under that law (*m*). Under the Evidence Act, however, it is enough to establish legitimacy that the *birth* took place during the continuance of marriage, although the *conception* may have taken place *before* marriage. In other words, conception, and not birth, is the starting point of legitimacy according to the rule of Mahomedan law. If a child is born *within less than six months* after marriage, it is regarded under that law as legitimate, on the ground that it must have in that event been conceived before marriage. Mr. Field, in his work on the Law of Evidence, says: "It may be supposed that the provisions of this section [*i.e.*, s. 112 of the Evidence Act] will supersede certain rather absurd rules of the Mahomedan law by which a child born *six* months after marriage, or within two years after divorce or the death of the husband, is presumed to be his legitimate offspring." On the other hand, Sir R. K. Wilson, in his Digest of Anglo-Muhammudan Law, says (s. 83) that the rule of the Evidence Act is really a rule of substantive marriage law rather than of evidence, and as such has no application to Mahomedans so far as it conflicts with the Mahomedan rule set out above. The correct view, it is submitted, is the one taken by Mr. Field. Whether the rule laid down in s. 112 of the Evidence Act is a rule of substantive law or of evidence, the fact stands that the rule finds its place in an enactment which applies to *all* classes of persons in British India. There is, therefore, no reason why it should not be applied to Mahomedans.

246. Presumption as to legitimacy: birth after dissolution of marriage.—A child born of a married woman within two years after divorce or the death of the husband is presumed to be the legitimate child of the husband, but not a child born more than two years after the dissolution of the marriage by death or divorce (*Baillie*, 396-397).

But this rule of Mahomedan law, it is submitted, must now be taken to be superseded by the provisions of the Indian Evidence Act, s. 114.

In fact, it was held by the High Court of Calcutta prior to the passing of the Evidence Act, that "notwithstanding Mahomedan law, a Court of Justice cannot pronounce a child to be the legitimate offspring of a particular individual when such a conclusion would be contrary to the course of nature and impossible" (*n*). Hence it was held in that case that notwithstanding Mahomedan law, a child born *nineteen* months after the divorce of its mother by her former husband was not the legitimate offspring of that husband. That case was decided in 1871, that is, a year before the passing of the Evidence Act. The decision, it seems, would be the same under s. 114 of that Act. That section provides that "the Court may presume the existence of any fact which it thinks likely to have happened, *regard being had to the common course of natural events*," etc. Having regard to the provisions of that section, a Court would be justified in presuming that a child born of a woman nineteen months after her divorce by her husband is not the legitimate child of the husband.

Shiah law.—The longest period of gestation according to the Shiah law is 10 months: Baillie, Part II, 90.

(*m*) *Ashrufood Dowlah* v. *Hyder Hossein Khan* (1866) 11 M. I. A. 94.

(*n*) *Ashruff Ali* v. *Meer Ashad Ali* (1871) 16 W. R. 260.

Acknowledgment of Legitimacy.

247. Acknowledgment of Legitimacy.—Legitimacy is not a condition essential to the right of inheritance from the mother (s. 72); but it is a condition precedent to the right of inheritance from the father, and depends upon the existence of a lawful marriage between the parents of the claimant at the time of his conception or birth. When legitimacy cannot be established by *direct* proof of a lawful marriage, "acknowledgment" is recognised by the Mahomedan law as a means whereby the marriage and legitimate descent may be established as a matter of substantive law for the purposes of inheritance (*o*).

Baillie, 406; Hed., 439. The doctrine of acknowledgment is an integral portion of the Mahomedan family law; hence the conditions under which it will take effect must be determined with reference to Mahomedan Jurisprudence (*p*).

248. Acknowledgment may be express or implied.—The acknowledgment by a Mahomedan of another as his legitimate child may be made either by express declaration or it may be presumed from treatment tantamount to acknowledgment of legitimacy (*q*). But mere continued cohabitation with a woman does not suffice to raise such a legal presumption of a marriage with her as to legitimatize the offspring. The cohabitation must be a cohabitation *as man and wife*, as distinguished from "a mere casual concubinage" (*r*), and the treatment must be such as to amount to acknowledgment of legitimacy (*s*).

[(a) A child is born to a Mahomedan of a woman who had resided in his female apartments for a period of 7 years *prior* to the birth of the child. It is proved that the cohabitation was a *continual* one and not merely "casual," and that it was between a man and a woman cohabiting together as *man and wife* and having that repute *before the conception* commenced. It is also proved that the child was born under his roof, and continued to be maintained in his house without any steps being taken on his part or of any one else to repudiate its title to legitimacy as his offspring. These facts are sufficient to raise a presumption of marriage and acknowledgment: *Khajah Hidayat* v. *Rai Jan* (1844) 3 M. I. A. 295.

(*o*) *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 330; *Musst Bebe-Fazilatunnessa* v. *Musst Bibee Kamarunenessa* (1905) 9 C. W. N. 352.

(*p*) *Ib.*

(*q*) *Saiyad Waliulla* v. *Miran Saheb* (1864) 2 B. H. C. 285.

(*r*) *Mahomed Bauker* v. *Shurfoon Nissa* (1860) 8 M.I.A. 136, 59.

(*s*) *Khajah Hidayat* v. *Rai Jan Khanum* (1844) 3 M.I.A. 295; *Ashrufood Dowlah* v. *Hyder Hossein Khan* (1866) 11 M. I. A. 94; *Mahammad Azmat* v. *Lalli Begum* (1881) 8 Cal. 422, 9 I. A. 8; *Sadakat Hossein* v. *Mahomed Yusuf* (1883) 10 Cal. 663, 11 I. A. 31; *Abdul Razak* v. *Aga Mahomed Jaffer* (1893) 21 Cal. 666; 21 I. A. 56; *Masit-un-nissa* v. *Pathani* (1904) 26 All. 295; *Musst Bibee Fazilatunnessa* v. *Musst Bibee Kamarunnessa* (1905) 9 C. W.N. 352.

Note.—In *Mahomed Bauker* v. *Shurfoon Nissa* (1860) 8 M. I. A. 136, there was abundant evidence of continued cohabitation between the father and the mother of the claimant. But there was no proof in that case of treatment tantamount to acknowledgment as in the above illustration, and the claimant was therefore adjudged to be illegitimate.

(b) A child is born to a Mahomedan of a woman who had been in his service for some time before the birth of the child. It is alleged that the man entered into a *muta* marriage (s. 206B) with the woman, but, the date of the marriage is not found. The evidence shows that pregnancy commenced *before* the woman had the acknowledged status of a *muta* wife. It does not appear when the intercourse began which led to the birth, nor what the nature of it was, whether casual or of a permanent character. It is proved that there was no express acknowledgment, and it appears from the evidence that the treatment of the child was *equivocal*, he being sometimes treated as a son and at others not. These facts are not sufficient to raise a presumption of marriage and acknowledgment: *Ashrufood Dowlah* v. *Hyder Hussein* (1866) 11 M. I. A. 94.]

249. Conditions of a valid acknowledgment.—In order that an acknowledgment may be effective, it is necessary that the following conditions should concur:—

(1) the acknowledgment must be not merely of sonship, but of legitimate sonship (*t*);

(2) the acknowledgment must not be impossible upon the face of it (*u*), that is, it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment being the wife of another man (*v*), or within prohibited degrees of the acknowledgor (*w*) or a prostitute (*x*), it would be apparent that the issue would be the issue of adultery, incest or fornication;

(3) the acknowledgee must not be known to be the child of another man;

(4) the acknowledgee must confirm the acknowledgment, but such confirmation is not necessary when he is an infant.

Hed., 439; Baillie, 406.

Burden of proof.—As marriage among Mahomedans may be constituted without any ceremonial, direct proof of marriage is not always available. Where direct proof is not available, indirect proof may suffice. Now one of the ways of indirect proof is

(*t*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I. A. 114, 120, 60 I. C. 837.

(*u*) (1921) 48 I.A. 114, 120-121, 60 I. C. 837.

(*v*) *Liaqat Ali* v. *Karim-un-Nissa* (1893) 15 All 396; *Mardensaheb* v. *Rajaksaheb* (1909) 34 Bom. 111, 4 I. C. 254.

(*w*) *Aizunnissa* v. *Karim-un-Nissa* (1895) 23 Cal. 130.

(*x*) *Dhan Bibi* v. *Lalan Bibi* (1900) 27 Cal. 801.

by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but of legitimate sonship. Further, it must not be impossible upon the face of it as stated in the present section. If these conditions are satisfied, the acknowledgment gives rise to a presumption that there was a marriage between the parents. The presumption, however, being one of fact, and not *juris et de jure*, it may be rebutted by positive proof that there was *no marriage* between the parents. If it is not rebutted, the marriage will be held proved and the legitimacy of the acknowledgee will be held to be established (*y*).

Presumption of legitimacy.— A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful, cannot be legitimatized by acknowledgment. Acknowledgment has only the effect of legitimation whether either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a *matter of uncertainty*. An acknowledgment, in other words, is of no avail, if it be proved that there was *no marriage* between the parents of the acknowledgee, or that if there was a marriage it was *unlawful*. The rule is limited to cases of *uncertainty* of legitimate descent and proceeds entirely upon an *assumption of legitimacy* and the establishment of such legitimacy by the force of the acknowledgment (*z*). "No statement made by one man that *another proved to be illegitimate* is his son can make that other legitimate, but *where no proof of that kind has been given*, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy is possible" (*a*) [s. 250].

The acknowledgment must be not merely of sonship, but of legitimate sonship The latter, however, may be presumed for the former, for when a man acknowledges another to be his son, that *prima facie* means his legitimate son (*b*). But this presumption may be rebutted by proving facts showing that the acknowledgment of sonship was not intended to have the serious effect of conferring the *status* of legitimacy on that other (*c*). Statements made by a member of a Mahomedan family, *e.g.*, the widow of the alleged father, that a person is a son or an heir, are evidence of family repute of legitimacy (*d*).

250. Right of inheritance.—If an acknowledgment is of legitimate sonship, and that relationship is possible in fact and law [s. 249], it raises a presumption of marriage between the acknowledgor and the mother of the acknowledgee and, unless rebutted, gives the acknowledgee the right of inheritance to the acknowledgor as his legitimate child (*e*), and a similar right to the mother also of the acknowledgee as the lawful wife of the acknowledgor (*f*).

(*y*) (1921) 48 I. A. 114, 120-121, 60 I. C. 837.

(*z*) *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All 289, 337.

(*a*) *Sadik Husain* v. *Hashim Ali* (1916) 43 I. A. 212, 234, 38 All. 627, 661, 36 I. C. 104, *Habibur Rahman* v. *Altaf Ali* (1921) 48 I. A. 114, 23 Bom. L. R. 636, 60 I. C. 837, *Usmanmiya* v. *Valli Mahomed* (1916) 40 Bom. 28, 33, 30 I. C. 904; *Ibrahim* v. *Mubarak* (1920) 1 Lah. 229, 56 I. C. 923.

(*b*) *Fuzeelun Bebee* v. *Omdah Bebee* (1868) 10 W.R. 469, apprd. in 43 I. A., 212, 232, 38 All. 627, 659, 36 I. C. 104, *supra*.

(*c*) *Abdool Razak* v. *Aga Mahomed* (1893) 21 I.A. 56, 70, 21 Cal. 666, 679.

(*d*) 43 I.A. 212, 234-235, 39 All. 627, 661, 36 I. C. 104.

(*e*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I. A. 114, 60 I.C. 837; *Muhammad Azmat* v. *Lalla Begum* (1881) 8 Cal. 422, 9 I. A. 8; *Sadakat Hossein* v. *Mahomed Yusuf* (1883) 10 Cal 663, 11 I.A. 31.

(*f*) *Khajah Hidayat* v. *Rai Jan* (1844) 3 M.I.A. 295, 318; *Wise* v. *Sabdulonissa* (1869) 11 M. I. A. 17, 193; *Nawab Malka Jehan* v. *Muhammad* (1873) Sup. Vol. I.A. 192); *Khajooronissa* v. *Rowshan Jehan* (1876) 2 Cal 184, 199, 3 I. A. 291; *Mahatala* v. *Haleemoozooman* (1881) 10 C.L.R. 293; *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 82, 45 Cal. 878, 890, 47 I. C. 513; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I. A. 114, 60 I. C. 837.

The acknowledged child may be either a son or a daughter (*g*).

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother (*h*).

251. Acknowledgment of legitimacy irrevocable.—Once an acknowledgment of paternity is made, it cannot be revoked either by the acknowledgor or persons claiming through him (*i*).

252. Adoption not recognised.—The Mahomedan law does not recognize adoption as a mode of filiation (*j*).

Even a Hindu converted to Mahomedanism cannot adopt (*k*).

(*g*) *Oomda Bebee* v. *Synd Shah Jonab* (1866) 5 W. R. 132.

(*h*) *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 81-82, 45 Cal 878, 889, 890, 47 I C. 513

(*i*) *Ashrufood Dowlah* v. *Hyder Hossein* (1866) 11 M. I. A 94; *Muhammad Allhadad* v *Muhammad Ismail* (1888) 10 All 289, 317

(*j*) *Muhammad Allahdad* v *Muhammad Ismail* (1888) 10 All 289, 340, *Muhammad Umar* v *Muhammad Niaz-ud-Din* (1912) 39 Cal. 418 39 I A 19, 13 I C 344

(*k*) *Bai Machhbai* v *Bai Hirbai* (1911) 35 Bom 264, 10 I C 816

CHAPTER XV.

GUARDIANSHIP OF PERSON AND PROPERTY.

253. Age of majority.—In this Chapter, "minor" means a person who shall not have completed the age of eighteen years.

See Indian Majority Act IX of 1875, s. 3, and the Guardians and Wards Act VIII of 1890, s. 4, cl. (1).

Age of majority according to Mussalman law.—According to the Islamic law, the minority of a male or female terminates when he or she attains puberty. Among the Hanafis and the Shiahs, puberty is presumed on the completion of the fifteenth year. Under the Mussalman law, every individual upon attaining puberty may enter into legal transactions of every kind affecting his or her property or his or her status, *e.g.*, marriage and divorce [Amir Ali, Vol. II, 3rd ed., pp. 581, 584].

254. Power of the Court to make order as to guardianship.—When the Court is satisfied that it is for the welfare of a minor that an order should be made (1) appointing a guardian of his person or property, or both, or (2) declaring a person to be such guardian, the Court may make an order accordingly.

Guardian and Wards Act, s. 7.

255. Matters to be considered by the Court in appointing guardian.—(*1*) In appointing or declaring the guardian of a minor, the Court should, subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject*, appear in the circumstances to be for the welfare of the minor.

(*2*) In considering what will be for the welfare of the minor, the Court should have regard to the age and sex of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(*3*) If the minor is old enough to form an intelligent preference. the Court may consider that preference.

Guardians and Wards Act, s. 17. The italicized words show that if a minor of whose person or property or both a guardian is to be *appointed or declared* by the Court is a Mahomedan, the Court is to have regard to the rules of Mahomedan law *subject, however, to the provisions of sub-sections* (2) and (3). We now proceed to enumerate the rules of Mahomedan law relating to (1) the guardianship of the person of a minor, and (2) the guardianship of his property.

Guardians of the Person of a Minor.

256. Right of mother to custody of infant children.—The mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years, and of her female child until she has attained puberty, and the right is not lost though she may have been divorced by her husband (*l*).

Had., 138; Baillie, 435.

The mother is not entitled to the custody of her infant child if she is wicked or unworthy to be trusted as where she is a professional singer or mourner or where she has committed a theft: Baillie, 435. See also s. 258.

Shiah law.—Sections 256 to 260 contain the rules of the Sunni law as to the guardianship of the person of a minor. There is a substantial difference in this respect between the Sunni and the Shiah law. Under the Shiah law, the mother is entitled to the custody of her male child during the whole time of suckling (that is, two years), and of her female child until she has completed the age of seven years. But if the mother dies before the children attain the aforesaid age, the father becomes entitled to their custody (*m*). After the child attains the aforesaid age, the father has the right to the custody of the child (*n*). But if the father be then dead, or if he dies thereafter while the children are still minors, the custody belongs to the mother. On the death of both parents, the father's father is entitled to the custody of the child. It is doubtful to whom the custody belongs in the absence of the father's father: Baillie, Part II, 95.

257. Right of female relatives in default of mother.—Failing mother, the right of custody of a boy under the age of seven years, and of a girl that has not attained puberty, devolves upon the following female relatives in the order enumerated below:—

(1) mother's mother, how high soever;

(2) father's mother, how high soever;

(3) full sister;

(4) uterine sister;

(5) [consanguine sister];

(*l*) Baillie, 435; *Zarabibi* v. *Abdul Razak* (1910) 12 Bom. L. R. 891, 8 I. C. 618, *Emperor* v. *Ayshabai* (1904) 6 Bom. L. R. 536.

(*m*) *Salim-un-Nissa* v. *Saadat* (1914) 36 All. 466, 24 I. C. 632.

(*n*) *Lardli* v. *Mahomed* (1887) 14 Cal. 615

(6) full sister's daughter ;

(7) uterine sister's daughter ;

(8) [consanguine sister's daughter] ;

(9) maternal aunts, in like order as sisters ; and

(10) paternal aunts, also in like order as sisters.

Hed., 138 ; Baillie, 435-436. Neither the *consanguine* sister (No. 5) nor her daughter No. 8) is expressly mentioned either in the Hedya or the Fatwa Alumgiri ; it almost seems as if the omission is accidental, for *paternal aunts* are expressly mentioned.

258. Females, when disqualified for custody.—A female (including a mother) otherwise entitled to the custody of a child loses the right of custody—

(1) if she marries a person not related to the child within the prohibited degrees (ss. 201-202) : but the right revives on dissolution of the marriage by death or divorce ;

(2) if she is "wicked," as where she is prostitute (*o*), or is a professional singer, or has committed theft or other criminal offence, or if she is otherwise "unworthy to be trusted."

Hed., 138-139 ; Baillie, 435-436 ; *Fuseephun* v. *Kajo* (1884) 10 Cal. 15 ; *Bhoocha* v. *Elahi Bux* (1885) 11 Cal. 574.

The reason of the rule in cl. (1) is that if a woman marries a man not closely related to the child, the child may not be treated kindly It is otherwise, however, where the mother, for instance, marries her child's paternal uncle or the maternal grandmother marries the paternal grandfather, because these men, being as parents, it is to be expected that they will treat the child kindly [Hed., 138].

Apostasy.—Apostasy is stated in the Fatwa Alumgiri as a ground of disqualification. The reason given is that a woman who relinquishes the Moslem faith would be kept in prison till she returned to the Mahomedan faith [Baillie, 435]. But this reason cannot apply in British India ; hence it would seem apostasy is no disqualification in British India [Baillie, 435, f. n. (3)]. See also Act 21 of 1850, and the notes of s. 208.

259. Right of male paternal relatives.—In default of all the female relatives mentioned above, the right of custody passes to the following persons in the order enumerated below :—

(1) the father ;

(2) father's father, how high soever ;

(*o*) *Abasi* v. *Dunne* (1878) 1 All. 598.

(3) full brother;

(4) consanguine brother;

(5) full brother's son;

(6) consanguine brother's son;

(7) full paternal uncle;

(8) consanguine paternal uncle;

(9) full paternal uncle's son;

(10) consanguine paternal uncle's son·

provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 201-202).

If there be none of these, it is for the Court to appoint a guardian.

Hed., 138, 139; Baillie, 437. It follows from the proviso to the section that though a *boy* may be given in the custody of his paternal uncle's son, a *girl* should not be entrusted to him, for he is not within the prohibited degree [Baillie, 437].

259A. Custody of married minor.—The mother of a girl who is married, but has not attained puberty, is entitled to the cutody of the girl as against the husband of the girl (*p*).

See Guardians and Wards Act, 1890, s. 19, which is to be read with s. 17 of that Act. See s. 255 above.

260. Custody of boy over seven and of girl who has attained puberty.—The father is entitled to the custody of a boy when he has completed the age of seven years, and of a girl when she has attained puberty. Failing father, the right of custody devolves upon the paternal relatives in the order and subject to the proviso mentioned in s. 259.

Hed., 129; Baillie, 438; *Idu* v. *Amiram* (1886) 8 All. 322.

According to the Mussalman law, the father's right of custody ceases on the boy or girl's attaining the age of puberty, that is on the completion of the fifteenth year [see notes to s. 253]. But it has been held that though under the Mahomedan law the father is not entitled to the custody of the person of his son after he has completed his fifteenth year, the effect of the Indian Majority Act, 1875, by which minority is continued until completion of the eighteenth year, is to extend the right of the father to the custody of the boy's person until completion of the eighteenth year (*q*).

(*p*) *Nur Kadir* v. *Zuleikha Bibi* (1885) 11 Cal. 649; *Korban* v. *King-Emperor* (1904) 32 Cal. 444.

(*q*) *Mohideen Ibrahim* v. *Mahomed Ibrahim* (1916), 39 Mad. 608, 613, 33 I. C. 894.

261. Custody of illegitimate children.—The custody of illegitimate children belongs to the mother and her relations. [*Macnaghten*, 298.]

Guardians of the Property of a Minor.

262. Legal guardians of property.—The following persons are entitled in the order mentioned below to be guardians of the property of a minor :—

(1) the father ;
(2) the executor appointed by the father's will ;
(3) the father's father ;
(4) the executor appointed by the will of the father's father.

Baillie, 689 ; *Macnaghten*, 62, 304. The four guardians mentioned in this section are hereinafter called *legal guardians*. It will be seen from what has been stated above that the only *relations* who are entitled to be the *legal guardians of the property* of a minor are (1) the father, and (2) the father's father. No other *relation* is entitled to the guardianship of the property of a minor *as of right*, not even the mother, brother or uncle. But the father or the paternal grandfather of the minor may appoint any one of these as his executrix or executor, in which case they become *legal guardians* and have all the powers of a *legal guardian* as defined in ss. 263 and 267. The *Court* also may appoint any one of them as guardian of the property of a minor, in which case they have all the powers of a guardian appointed by the Court as stated in ss. 264 and 267A.

Note that the only persons who may appoint a guardian of the property of a minor *by will* are his father and his father's father. Even the mother has no power to appoint by will a guardian of the property of her minor children. A mother's executor is *not a legal guardian*, nor is a brother's executor nor an uncle's executor. In fact no executor except the father's executor or the father's father's executor can be a *legal guardian* of the property of a minor : *Macnaghten*, 304. As to the powers of a *legal guardian*, see ss. 263 and 267.

262A. Guardian of property appointed by the Court.—In default of the legal guardians mentioned in s. 262, the duty of appointing a guardian for the protection and preservation of the minor's property devolves on the Court. The appointment of guardians of property is now governed by the provisions of the Guardians and Wards Act, 1890.

Baillie, 689; *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 84, 45 Cal. 878, 893, 47 I. C. 513 ; Guardians and Wards Act, 1890, s. 17.

The Court should, in appointing a guardian of the property of a minor, be guided by what appears in the circumstances to be for the *welfare* of the minor. Thus in one case the mother of a minor was appointed guardian of the property in preference to the

paternal uncle (r). The fact that the mother is a *purdanashin* lady is no objection to her appointment as guardian of her son's property (s).

262B. De facto guardian.—A *de facto* guardian is a person who has charge of the person or property of a minor without being his lawful guardian, that is, without being a *legal* guardian as defined in s. 262 or a guardian appointed by the Court as stated in s. 262A (t).

The expression "*de facto* guardian" is used in contradistinction to "*de jure* guardian." As to the powers of a *de facto* guardian, see ss. 265 and 267B below.

263. Sale of immoveable property by legal guardian.—A *legal guardian* of the property of a minor has no power to sell the *immoveable* property of the minor except in the following cases, namely, (1) where he can obtain double its value; (2) where the minor has no other property and the sale is absolutely necessary for his maintenance: (3) where there are debts of the deceased, and no other means of paying them; (4) where there are legacies to be paid, and no other means of paying them: (5) where the expenses exceed the income of the property; (6) where the property is falling to decay: and (7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Baillie, 687-688; *Macnaghten*, p. 64, s. 14, pp. 305, 306, *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 91; *Hurbai* v. *Hiraji*, 20 Bom. 116, 121; *Kali Dutt* v. *Abdul Ali* (1888) 16 Cal. 627, 16 I. A. 96; *Thottoli* v. *Kunhammed* (1910) 34 Mad 527, 8 I. C. 1093.

The prohibition against alienation referred to in this section applies to immoveable property to which the minor has an undisputed title. It does not apply where the minor's title to the property is disputed. Thus where the father of a minor sold a portion of the immoveable property inherited by the minor from his mother *the title to which was in dispute*, and the sale was made pursuant to a compromise which *put an end to pending litigation*, the sale was held to be binding on the minor as being one *for the minor's benefit* (u). As to the power of a legal guardian to dispose of the *moveable* property of his ward, see s. 267 below.

264. Alienation of immoveable property by guardian appointed by the Court.—A person who is appointed guardian of the property of a minor under the Guardians and Wards Act, 1890, has no power, *without the previous permission of the Court*, to mortgage or charge, or transfer by sale, gift, exchange, or otherwise, any part of the *immoveable property* of his ward,

(r) *Alim-ullah* v. *Abadi* (1906) 29 All. 10.

(s) *Jaiwanti* v. *Gajadhar* (1911) 38 Cal. 783, 785, 10 I. C. 334.

(t) *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 92, 45 Cal. 878, 903, 47 I. C. 513.

(u) *Kali Dut* v. *Abdul Ali* (1888) 16 I. A. 96, 16 Cal 627.

or to lease any part of the property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor. A disposal of *immoveable property* by a guardian in contravention of the foregoing provisions is *voidable* at the instance of the minor or any other person affected thereby [Guardians and Wards Act, 1890, ss. 29, 30].

As to the disposal of moveable property by a guardian appointed by the Court, see s. 267 A below.

265. Alienation of immoveable property by a de facto guardian.—A *de facto* guardian has no power to transfer to another any right or interest in the *immoveable* property of the minor which the transferee can enforce against the minor; nor can such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the minor as a trespasser (*v*).

[(a) *A* dies leaving a widow and a minor son. The widow sells to *B* the share of herself and of her minor son in an immoveable property inherited by them from *A*. The sale is void to the extent of the minor's interest in the property: *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 45 Cal. 878, 47 I. C. 513; *Muhammad Shafi* v. *Mst. Kalsum Bi* (1923) 4 Lah. 467, 79 I. C. 269, ('24) A. L. 290.

(b) *A* mortgages his immoveable property to *B*. *A* dies leaving 4 grandsons one of whom is a minor. By his will *A* bequeaths the said property to his 4 grandsons in equal shares subject to the payment of the mortgage debt. The three major grandsons on their own behalf, and one of them purporting to act also as guardian of the minor, sell the property including the minor's share to *B* in consideration of the discharge by *B* of the mortgage debt, and put *B* in possession as purchaser On attaining majority, the minor sues *B* to redeem the mortgage to the extent of one-fourth of the property, that being his share The sale is not binding on the minor, and he is entitled to redeem *his* share of the property: *Mata Din* v. *Ahmad Ali* (1912) 34 All. 213, 39 I. A. 49, 13 I. C. 976.]

Where a person, who is neither a legal guardian (s. 262) nor a guardian appointed by the Court (s. 262 A), assumes to deal with the property of a minor as though he was a guardian, he is called a *de facto* guardian. Thus neither a mother, nor a brother, nor a sister, nor an uncle is a legal guardian of a minor's property, and if he or she transfers the minor's *immoveable* property, the transfer, being one made by a *de facto* guardian, is *absolutely void*, even though it may have been made to pay off the debts of the deceased (*w*). It was so held by their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi* (*x*). Prior to that decision there was a conflict of opinion among the different High Courts as to the legal effect of such a transaction, it being held in some cases that it was absolutely void, and in others that it was valid if it was for the benefit of the minor. The principle

(*v*) *Imambandi* v. *Mutsaddi* (1918) 45 I. A. 73, 45 Cal. 878, 47 I. C. 513; *Mata Din* v. *Ahmad Ali* (1912) 39 I. A. 49, 34 All. 213, 13 I. C. 976. See also *Moulvi Abu Mahomed* v. *Amtal Karim* (1888) 15 I. A. 220 [sale by mother—lapse of time—acquiesance].

(*w*) (1912) 39 I.A. 49, 34 All. 213, 13 I. C. 976, *supra*.

(*x*) (1918) 45 I. A. 73, 45 Cal. 878, 47 I. C. 513.

of the Privy Council decision has been extended to cases of agreements by a *de facto* guardian to refer to arbitration disputes relating to immoveable property belonging to a minor, and such agreements have been held to be void (*y*). As to the power of a *de facto* guardian to dispose of the moveable property of a minor in his charge, see s. 267 B below.

266. Agreement by guardian for purchase of immoveable property for his ward.—Neither the guardian of a minor nor the manager of his estate is competent to bind the minor or his estate by a contract for the *purchase* of immoveable property.

[*A*, the manager of the estate of a minor, *B*, agrees to purchase certain immoveable property on *B*'s behalf from *C*. The agreement is *void*, and neither *B* nor *C* can sue for specific performance of the contract: *Mir Sarwarjan* v. *Fakhruddin* (1912) 39 Cal. 232, 39 I. A. 1, 13 I. C. 331. Note that an agreement for *purchase* is not binding on the minor in *any case*.]

267. Power of legal guardian to dispose of moveable property.—A legal guardian of the property of a minor (s. 262) has power to sell or pledge the goods and chattels of the minor for the minor's imperative necessities, such as food, clothing or nursing (*z*).

267A. Power of guardian appointed by the Court to dispose of moveable property.—A guardian of the property of a minor *appointed by the Court* (s. 262A) is bound to deal with *moveable property* belonging to the minor as carefully as a man of ordinary prudence would deal with it if it were his own [Guardians and Wards Act, 1890, s. 27].

267B. Power of de facto guardian to dispose of moveable property.—A *de facto* guardian has the same power to sell and pledge the goods and chattels of a minor in his charge as a legal guardian of his property (*a*).

Guardians and Wards Act.

268. Applicability of the Guardians and Wards Act.—All applications for the appointment or declaration of a guardian of the person or property or both of a Mahomedan minor must now be made under the Guardians and Wards Act, 1890, and the duties, rights, and liabilities of guardians appointed or declared under that Act, are governed by the provisions of that Act.

(*y*) *Mohiuddin* v. *Ahmed* (1920) 47 Cal. 713, 57 I. C. 945.

(*z*) *Imambandi* v. *Mutsaddi* (1918) 45 I.A. 73, 86-87, 45 Cal. 878, 895-896, 47 I. C. 513.

(*a*) (1918) 45 I.A. 73, 86-87, 45 Cal. 878, 895-896, 47 I. C. 513, *supra*.

CHAPTER XVI.

MAINTENANCE.

269. Maintenance of children and grandchildren.—(*1*) A father is bound to maintain his minor sons. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his *adult* sons unless they are disabled by infirmity or disease. The mere fact that the children are in the custody of their mother during their infancy (s. 256) does not relieve the father from the obligation of maintaining them (*b*). But the father is not bound to maintain any of his children, if they have property of their own.

(*2*) If the father is poor, and incapable of earning anything by his own labour, the mother, if she is rich, is bound to maintain her children in like circumstances as the father.

(*3*) If the father is poor and infirm, and the mother is poor, the duty to maintain the children lies on the grandfather, provided the grandfather is rich.

Hed., 148; Baillie, 459-462. A daughter when married passes to her husband's family, and there is no obligation on the members of her natural family to maintain her after her marriage, not even if she is divorced (*c*).

270. Maintenance of parents.—(*1*) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

(*2*) A son, though in straitened circumstances, is bound to maintain his mother, if the mother, though not infirm, is poor.

(*3*) A son who, though poor, is earning something, is bound to support his poor father who is earning nothing.

Baillie, 465, 466: Hed., 148.

270A. Maintenance of grandparents.—A person is bound to maintain his paternal and maternal grandfathers and grandmothers if they are poor, but not otherwise, to the same extent as he is bound to maintain his poor father.

Baillie, 466.

(*b*) *Emperor* v. *Ayshabai* (1904) 6 Bom. L. R. 536; *Mahomed Jusab* v. *Haji Adam* (1913) 37 Bom. 71, 15 I. C. 520 [a Cutchi Memon case].

(*c*) *Pakrichi* v. *Kunhacha* (1912) 36 Mad. 385, 18 I. C. 236.

271. Maintenance of other relations.—Persons who are not themselves poor are bound to maintain their poor relations within the prohibited degrees in proportion to the share which they would inherit from them on their death.

Baillie, 467.

272. Statutory obligation of father to maintain his children.—If the father neglects or refuses to maintain his legitimate or illegitimate children who are unable to maintain themselves, he may be compelled, under the provisions of the Code of Criminal Procedure, to make a monthly allowance not exceeding fifty rupees for their maintenance.

See Criminal Procedure Code, s. 488. If the children are illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing maintenance (*d*).

273. Maintenance of wives.—See ss. 213 to 215 above.

(*d*) *Kanyadan* v. *Kayat Beeran* (1895) 19 Mad 401.

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